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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

BOHEMIAN CLUB,
Appellant,

VS.

FAIR EMPLOYMENT AND HOUSING COMMISSION, STATE OF CALIFORNIA; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; and MARK GUERRA, as Director,
Appellees.

On Appeal from the Court of Appeal of the State of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does § 701(b) of Title VII of the Civil Rights Act of 1964, enacted by Congress to protect the freedom of association of members of bona fide private clubs, preempt inconsistent state laws prescribing the employment practices of such private clubs?

2. Does the freedom of association guaranteed by the First Amendment protect from governmental intrusion the selection by private club members of employees involved in the members' private, social, associational activities?

3. Is a state court constitutionally required to make an independent review of the administrative record in determining whether a statute violates the freedom of association of private club members?*

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* The parties are named in the title of this jurisdictional statement. Appellant Bohemian Club is a private, non-commercial, social association of men only, with approximately 2,000 members.

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and MARK GUERRA, as Director,
Appellees.

On Appeal from the
Court of Appeal of the State of California

JURISDICTIONAL STATEMENT

Appellant Bohemian Club appeals from a final judgment of the Court of Appeal of the State of California. The California Fair Employment and Housing Act, as applied by the California Fair Employment and Housing Commission to the Club, prohibits the Club from employing only men in jobs integrally involved with the private, social, all-male associational activities that are the purpose of the Club's existence. The Court of Appeal held that the Act, as so applied, is constitutional and does not violate the freedom of association protected by the First Amendment. The Court of Appeal also held that the Act, as so applied, is not preempted by § 701(b) of Title VII of the Civil Rights Act of 1964, in which Congress intended to protect the freedom of association of private club members.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One ((1986) 187 Cal.App.3d 1), is printed in Appendix A. The order of the Supreme Court of the State of California denying review of the Court of Appeal's decision is printed in Appendix B.

The following other opinions were rendered in the case: The opinion of the Superior Court of the State of California, County of Sonoma, is printed in Appendix C; the opinion of appellee California Fair Employment and Housing Commission is printed in Appendix D.

JURISDICTION

The opinion of the Court of Appeal of the State of California was filed and entered on November 20, 1986 (Appx. A), and the order of the Supreme Court of the State of California was filed and entered on February 26, 1987 (Appx. B). A notice of appeal to this Court was timely filed in the Court of Appeal on May 19, 1987 (Appx. E).

This Court has jurisdiction pursuant to § 1257(2) of Title 28 of the United States Code. Appellant raised the claims in the proceedings below that the California Fair Housing and Employment Act "as applied to the Club, is preempted by conflicting and superseding provisions of Federal law and violates the members' Federal and state constitutional rights to privacy and free association" (Clerk's Transcript on Appeal, p. 467).

In the alternative, appellant respectfully submits that this statement should be regarded and granted as a petition for writ of certiorari pursuant to § 2103 of Title 28 of the United States Code.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment, United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1]

Section 701(b), Title VII, Civil Rights Act of 1964 (42 U.S.C. § 2000e(b)):

"The term 'employer' * * * does not include * * * (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 * * *."

Section 708, Title VII, Civil Rights Act of 1964 (42 U.S.C. § 2000e-7):

"Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

Section 1104, Title XI, Civil Rights Act of 1964 (42 U.S.C. § 2000h-4):

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

Pertinent provisions of the California Fair Employment and Housing Act, California Government Code § 12900, et seq., are printed in Appendix F.

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[1] The First Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment (e.g., *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 749, n.1).

STATEMENT OF THE CASE

The Bohemian Club is the epitome of a bona fide private club. As the California Court of Appeal stated,

> "The Bohemian Club is a distinguished private nonprofit association whose membership is limited to men professing devotion to the arts. It has a long and honorable history since its inception more than a century ago and it occupied an important place in the history of literature in early-day San Francisco. Its approximately 2,000 members are chosen by a highly selective process. Potential members are interviewed extensively and must be devoted to the arts, or willing to participate in artistic activities" (Appx. A, p. 3).

And

> "[T]he consequent relationship among members is undoubtedly 'intimate' in associational terms" (Appx. A, p. 10).

Although carefully selected for their dedication to the arts, Club members are men of diverse backgrounds[2], races and religions.[3] Membership cannot be purchased, and selection is not based upon business success, wealth, or status (Appx. C, p. 32). The Club is strictly noncommercial; it prohibits all commercial or business activities (Appx. D, p. 45). "It is *not* a 'business' commercial luncheon club" (Appx. C, p. 32; emphasis added).

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[2] The membership includes the famous and the unknown. Past members include John Muir and Jack London (Admin.Record, p. 368); recent members include Herman Wouk, Seiji Ozawa, former Governor Edmund G. Brown, and William F. Buckley, Jr. (Admin.Record, pp. 168, 460). The Club is *not* "just a club for very wealthy men" (Admin.Record, p. 363), and the membership includes musicians, writers, actors, artists, teachers, doctors, and men from a wide variety of other professions and occupations (Admin.Record, pp. 167-169, 290).

[3] The Club does not discriminate in employment (Appx. D, p. 49) or membership based on "race, religious creed, color, national origin, ancestry, physical handicap, marital status, citizenship, or sexual orientation" (Appx. C, pp. 27, 45).

The Club's purposes are and always have been male fellowship and participation in the arts in a men-only environment (Appx. C, p. 33). Participation in artistic activities is an obligation of membership; all members participate in Club activities (Appx. C, p. 33). All possible measures are taken to insure complete privacy of Club members (Appx. D, p. 47).

Important Club activities take place at the Grove, a rustic, completely private camping area, during two all-male summer retreats when members, approved guests, and employees live at the Grove (Appx. C, p. 33).[4] Members participate in artistic, musical, and dramatic performances, both serious and for entertainment, on "virtually a 24-hour-a-day basis throughout the Grove" (Appx. C, p. 33; Appx. D, p. 47). The retreats include concerts, theatrical productions, and oratorical presentations; informal musical entertainment, singing, and dancing is performed extemporaneously throughout the day and night in outdoor theatres and along the walks and paths (Appx. C, p. 33; Appx. D, pp. 47-48).[5] Many of these activities take place during meal times and are an integral part of the camaraderie in which employees are involved throughout the Grove (Appx. C, p. 33).

To protect the members' associational and privacy interests, the Club employs only men at the Grove (Appx. C, p. 37).[6] Employees are necessarily involved with and integral to the all-male

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[4] Guests may be invited to the Midsummer Encampment only upon written application by a member and approval by the Club board of directors of the proposed guest's merits and qualifications (Admin.Record, pp. 733-734).

[5] All conversations and events at the Grove are "off-the-record" (Admin.Record, p. 185); "it is both explicit and implicit that the whole operation is entirely private" (Admin.Record, p. 437).

[6] The Club employs women at its City Club in all positions which do not require intrusion into the all-male atmosphere of camaraderie that distinguishes Club activities (Appx. C, p. 37). In accordance with the policy, the Club regularly employs women in its print shop, in accounting and administrative positions in its business office, in maintenance positions, and as food servers in the private rooms for members' parties (Appx. A, p. 3; Appx. C, p. 37).

society at the Grove (Appx. C, p. 36). Employees are present during all of the 24-hour-a-day performances and festivities (Appx. C, p. 36). Employees work before, during, and after meal times in the open dining area, where dramatic and musical events take place (Appx. C, p. 35). Other informal gatherings and performances occur throughout the Grove while employees work and serve refreshments, necessarily involving them in the company of members (Appx. C, p. 35).

Women are not permitted at the Grove during the men-only retreats (Appx. C, p. 37). The intrusion of women would fundamentally change the nature and purpose of the Club—its collegiality, camaraderie, and fellowship (Appx. C, p. 37). The presence of women at the Grove would fundamentally alter and inhibit the participation by members and would bring about a completely different social and emotional environment from that which is at the heart of the Club's purpose (Appx. C, pp. 37-38).[7] Some changes in the environment would be subtle, and others would be dramatic, but the presence of women would significantly alter the activities, attitudes, and experiences for which the Club was formed and exists (Appx. C, p. 38).

Proceedings below

Appellee California Department of Fair Employment and Housing accused the Club of discriminatory hiring, in violation of the California Fair Employment and Housing Act (Appx. A, p. 1). In response, the Club asserted, among other things, that

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[7] Dr. Bernard, a sociologist specializing in family and community organizations, makes the same point in her book, The Sex Game: Communication Between the Sexes (Atheneum, 1972) p. 47 (quoted at Clerk's Transcript on Appeal, pp. 524-525). For example, the trial court found that "Club members and guests would be inhibited in taking women's roles and performing generally in theatricals, musicals, serious drama, skits and other artistic productions if women were present; members now comfortably portray female as well as male roles because they are within the private social atmosphere reflecting the Club's spirit and traditional objectives; attendance and member participation in such associational activities would decrease if women were present" (Appx. C, p. 38).

gender is a bona fide occupational qualification for jobs at the Grove and other jobs that involve the collegial gatherings that are at the core of the Club's purpose and existence and, in any event, the Act (as applied to the Club) is preempted by conflicting and superseding federal laws and violates the members' constitutional rights of privacy and free association (see Appx. A, p. 1).

The administrative law judge who heard the case credited the testimony of the Club witnesses and determined that the Club's employment practices were bona fide, that the Club had not engaged in illegal employment discrimination, and that gender was a bona fide occupational qualification (Admin.Record, pp. 1304-1334). The Fair Employment and Housing Commission, without hearing or seeing any witnesses or taking any evidence, rejected the administrative law judge's decision, and ordered the Club to institute an affirmative action program to employ women throughout the Club (Appx. A, p. 2).

The California Superior Court issued a writ of mandate commanding the Commission to set aside its decision and to dismiss the accusation against the Club (Appx. C). Because the Commission's decision substantially affected the Club members' constitutional freedom of association (Appx. C, p. 26), the Superior Court made findings pursuant to its independent judgment (Appx. C, pp. 30-39).

The California Court of Appeal reversed the judgment and directed the Superior Court to reinstate the Commission's findings (Appx. A). On February 26, 1987, the California Supreme Court denied a petition for review (Appx. B).

THE QUESTIONS ARE SUBSTANTIAL

This case presents the important unresolved question whether a state may regulate the employment practices of bona fide private, non-commercial, membership clubs in a manner that is inconsistent with the purpose of federal law, and accordingly preempted by federal law. Section 701(b) of Title VII exempts "bona fide private membership clubs" from the coverage of Title VII; the legislative history demonstrates that § 701(b) was designed to protect the freedom of association of bona fide private member-

ship clubs. Contrary to the congressional intent to protect private clubs from regulation by employment discrimination laws, the ruling below holds that Title VII is "neutral" on private club employment practices (Appx. A, pp. 14, 17). But Title VII is not "neutral": Congress has expressed in § 701(b) its purpose of preserving a "small non-commercial enclave for the unfettered exercise of the freedom of association" (see *Fesel* v. *Masonic Home of Delaware, Inc.* (D.Del. 1977) 428 F.Supp. 573, 577).

The ruling below not only conflicts with congressional intent, but also creates a serious conflict with the decision in *Kemerer* v. *Davis* (E.D.Mich. 1981) 520 F.Supp. 256 that application of the Civil Rights Act of 1866, 42 U.S.C. § 1981, to the employment practices of a bona fide private membership club would be in "irreconcilable conflict" with § 701(b). If a federal law such as § 1981 would be inconsistent with Title VII when applied to private membership clubs, *a fortiori* a state law that purports to regulate bona fide private membership clubs is no less inconsistent with the congressional purpose to preserve the associational rights of club members. Any law, whether state or federal, which purports to regulate employment by private clubs is inconsistent with the purpose of § 701(b) and may not stand.

The decision is of crucial importance to bona fide private, non-commercial, associational groups throughout the country. There are hundreds of such clubs, all totally unlike the Rotary Clubs and United States Jaycees considered by this Court in prior decisions (see *Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte* (U.S. May 4, 1987) 55 U.S. Law Week 4606, 4609, n. 6, ____ U.S. ____). The ruling below gives states carte blanche to destroy members' freedom of association by intruding into the selection of employees who will necessarily become involved in bona fide private associational activities. The court below has created a dangerous precedent by approving the state's attempt to force a bona fide private social association of men to employ women, even though the presence of women at the Club's retreats would destroy the very purpose and reason for existence of the association—pursuit of the arts in an all-male environment.

This is not a case where the state is regulating a business club or an organization with chapters across the nation. Rather, the

state is attempting to regulate the long-standing private social activities of an entirely non-commercial group, thus interfering with relationships among members that are "undoubtedly 'intimate' in associational terms" (Appx. A, p. 10). If the ruling below is left unreviewed, the state may not only require an all-male group to hire women to participate in its previously all-male retreats, but also require a women's club to hire men to join in previously all-female activities, or require an all-black sorority to hire whites to work and live in a private dormitory intended to provide a supportive all-black environment for black students. Many private groups formed for associational purposes will cease to exist because their purposes can no longer be achieved. States will have the power to regulate out of existence those totally non-commercial social clubs that Congress intended to preserve as "a refuge for private associational values" (*EEOC* v. *St. Joseph Hospital East Inc.* (W.D.Tenn. 1979) 19 FEP Cases 1439, 1440). Such a blatantly overreaching use of state employment discrimination laws is without precedent. A summary dismissal or affirmance by this Court would convert the ruling below into a precedent binding upon all other courts (*Hicks v. Miranda* (1975) 422 U.S. 332, 344-345).

Clearly, the issues presented are of crucial importance to the administration of employment discrimination laws, the freedom of association of members of all varieties of private clubs and, indeed, to the pluralistic nature of our society.

I

THE APPLICATION OF STATE EMPLOYMENT DISCRIMINATION LAWS TO REGULATE THE EMPLOYMENT PRACTICES OF BONA FIDE PRIVATE MEMBERSHIP CLUBS IS INCONSISTENT WITH, AND PREEMPTED BY, § 701(b) OF TITLE VII, IN WHICH CONGRESS INTENDED TO PROTECT THE FREEDOM OF ASSOCIATION OF PRIVATE CLUB MEMBERS.

The issue—whether a state, contrary to the purposes of Title VII, may require a bona fide private membership club to hire employees whose presence would undermine the purpose of the

club—is of crucial importance to private clubs and associations throughout the country.

All state laws "inconsistent with *any of the purposes of* [the Civil Rights Act of 1964], or *any provision* thereof" are preempted (Title XI, § 1104, 42 U.S.C. § 2000h-4; emphasis added). Here, the application of California's employment law to private clubs is inconsistent with the purpose of § 701(b) of Title VII. Section 701(b) defines an "employer" to *exclude* "a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of [the Internal Revenue Code of 1954]" (42 U.S.C. § 2000e(b))—the Club is such a tax-exempt private membership club (Appx. C, p. 27). Thus, Congress exempted non-commercial private membership clubs from Title VII's coverage. The purpose of § 701(b) was to protect the freedom of association of private membership clubs; Title VII's sponsor, Senator Humphrey, emphasized that the private club exemption was designed to protect "the *genuine privacy of private clubs* or other establishments whose membership is genuinely selective on some reasonable basis" (110 Cong.Rec. (June 13, 1964) 13697; emphasis added).

The courts have confirmed the congressional objective: "The legislative history of Title VII rather clearly indicates that Congress drafted § 701(b) to preserve social and fraternal organizations of self-controlled membership as a refuge for private associational values" (*EEOC* v. *St. Joseph Hospital East Inc.* (W.D.Tenn. 1979) 19 FEP Cases 1439, 1440). The Title VII exemption and the parallel Title II (public accommodations) exemption for private clubs have similar purposes:

> "In Title II, Congress sought to preserve a small noncommercial enclave for the unfettered exercise of the freedom of association * * *. By including a similar exemption in Title VII, Congress made it possible, in this limited setting, for those who wish to restrict the universe of their personal associates to also determine with whom they would associate in their employer-employee relationships" (*Fesel* v. *Masonic Home of Delaware, Inc.* (D.Del. 1977) 428 F.Supp. 573, 577).

Given the clear congressional intent to protect the freedom of association of private club members, it necessarily follows that laws which impose employment practices on private membership clubs are "inconsistent" with the purpose of § 701(b). One court has expressly recognized that government regulation of private club employment is in conflict with the private club exemption in § 701(b). *Kemerer* v. *Davis* (E.D.Mich. 1981) 520 F.Supp. 256 holds that application of the Civil Rights Act of 1866, 42 U.S.C. § 1981, to the employment practices of a bona fide private membership club would be in "irreconcilable conflict" with § 701(b) (520 F.Supp. 258):

> "If applied literally, [§] 1981 would reach within private establishments protected by the 1964 Act, the two statutes, thus, are in conflict" (520 F.Supp. 258).

The court therefore held:

> "[P]rivate membership clubs are impliedly exempted from the provisions of [§] 1981 by virtue of the explicit, conflicting and therefore superseding exemption of Title VII * * *" (520 F.Supp. 260).

The California Court of Appeal is wrong in asserting that *Kemerer* merely discusses the reconciliation of two federal statutes (Appx. A, p. 14). As the above-quoted language from *Kemerer* demonstrates, laws that would reach into the employment practices of private membership clubs are inconsistent with § 701(b) (see *Hudson* v. *Charlotte Country Club* (W.D.N.C. 1982) 535 F.Supp. 313; but see *Guesby* v. *Kennedy* (D.Kan. 1984) 580 F.Supp. 1280). The inevitable conclusion from the *Kemerer* reasoning is that any law, whether state or federal, that purports to regulate employment by bona fide private clubs is inconsistent with the purpose of § 701(b) and may not stand.

Contrary to the suggestion of the ruling below, *Shaw* v. *Delta Air Lines, Inc.* (1983) 463 U.S. 85 does not hold that Title VII never preempts state employment discrimination laws because Title VII is "neutral" in those areas not covered by its terms (Appx. A, pp. 14, 17). Title VII is *not* "neutral" on the subject of employment practices of private membership clubs. Congress has expressed in § 701(b) its purpose of preserving a "small non-

commercial enclave for the unfettered exercise of the freedom of association" (see *Fesel* v. *Masonic Home of Delaware, Inc.* (D.Del. 1977) 428 F.Supp. 573, 577).

The crux of the ruling below is the erroneous rationalization that "Title VII's overriding objective of eliminating employment discrimination," results in preemption only of "[l]aws which *hinder* the protection of civil rights" (Appx. A, p. 16). The ruling below totally ignores the critical language of § 1104 of Title XI of the Civil Rights Act of 1964—that all state laws "inconsistent *with any of the purposes* of * * * any provision" of the Civil Rights Act are preempted (42 U.S.C. § 2000h-4; emphasis added). The issue thus presented is not whether state regulation of private club employment hinders "civil rights," but whether such regulation is inconsistent with any of the purposes of any provision—in this case, § 701(b) of Title VII of the Civil Rights Act.

The reliance of the ruling below upon the "savings clause" of § 708 of Title VII (42 U.S.C. § 2000e-7) highlights the need for review by this Court. *California Federal Sav. and Loan Ass'n* v. *Guerra* (1987) 107 S.Ct. 683, ____ U.S. ____ leaves open the question whether Title VII's preemptive scope is governed only by § 708, or by the express preemption provision in § 1104 of Title XI, in conjunction with § 708. Part III-A of Justice Marshall's opinion in *California Federal*, joined by Justices Brennan, Blackmun, and O'Connor (107 S.Ct. 689-691), necessarily suggests that sections 1104 and 708 must be considered together in determining Title VII's preemptive effect. Justice Scalia's concurring opinion concludes that § 708 is the only provision governing Title VII preemption (107 S.Ct. 697), and Justice Stevens' concurring opinion notes, but does not reach, the issue (107 S.Ct. 696, n.1). The dissenting opinion of Justice White, joined by Chief Justice Rehnquist and Justice Powell, cites both sections 708 and 1104 (107 S.Ct. 698, 702, n. 12), but also does not expressly address this issue. Thus, the proper interpretation of the provisions governing Title VII's preemptive scope is in a state of confusion.

No doubt the error of the ruling below stemmed from the novelty of this important issue and the lack of guidelines as to

Title VII's preemptive scope. The need for this Court's resolution of this issue is thus clear.[8]

II

THIS CASE ALSO PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION: WHETHER THE FREEDOM OF ASSOCIATION PROTECTS FROM GOVERNMENTAL INTRUSION THE SELECTION BY CLUB MEMBERS OF EMPLOYEES INVOLVED IN THE MEMBERS' PRIVATE, SOCIAL, ASSOCIATIONAL ACTIVITIES.

The ruling below, endorsing the intrusion by the state into the hiring practices of a private club, violates important freedom of association rights.

It is beyond dispute that the essence of the Club is its all-male functions; the central purposes of the Club have always been the enjoyment of male fellowship and the appreciation of the arts in an all-male atmosphere (Appx. C, p. 33). The freedom of association under the First Amendment guarantees the right to conduct private, social activities without governmental intrusion. This Court has always recognized "the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and

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[8] None of the lower court cases cited in the ruling below (Appx. A, pp. 15-16) involved situations where Congress had affirmatively expressed its intent to leave an area free from government regulation (see *Grann* v. *City of Madison* (7 Cir. 1984) 738 F.2d 786, certiorari denied (1984) 469 U.S. 918; *Thomas Pub. Co.* v. *Division of Human Rights* (S.D.N.Y. 1978) 456 F.Supp. 1104; *Local 246, Util. Wkrs. U.* v. *Southern California Edison Co.* (C.D.Cal. 1970) 320 F.Supp. 1262). The ruling below also cites several inapposite decisions of this Court that do not involve employment (Appx. A, p. 16; *Savage* v. *Jones* (1912) 225 U.S. 501; *Florida Avocado Growers* v. *Paul* (1963) 373 U.S. 132; *Moose Lodge No. 107* v. *Irvis* (1972) 407 U.S. 163) or do not involve a truly private club protected by the freedom of association (Appx. A, p. 16; *Roberts* v. *United States Jaycees* (1984) 468 U.S. 609).

groups as he chooses" (*Evans* v. *Newton* (1966) 382 U.S. 296, 298).[9]

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. * * * Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires" (*Moose Lodge No. 107* v. *Irvis* (1972) 407 U.S. 163, 179-180, Douglas, J., dissenting; cited with approval in *Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte* (U.S. May 4, 1987) 55 U.S.Law Week 4606, 4609, n. 6, ____ U.S. ____).

This constitutional protection applies without regard to the popularity or social utility of a club's ideas, beliefs, or objectives (*N.A.A.C.P.* v. *Button*(1963) 371 U.S. 415, 444-445). The courts must carefully scrutinize a state's attempt to regulate private clubs because of the threat that the state may single out clubs that endorse unpopular ideas or philosophies. The trial court expressly found that the Fair Employment and Housing Commission had acted arbitrarily and capriciously, in an intentional attack on the Club and the beliefs of the members:

> "The Commission has * * * engaged in arbitrary and capricious conduct by its prejudgment and bias against the Club, * * * and its announced motivation and bias against clubs which discriminate by having only men as members" (Appx. C, p. 39).

This Court has never delineated the scope of the freedom of association of truly private associations. The Court has approved regulation of the United States Jaycees, a nationwide organization whose local chapters are "large and basically unselective groups" (*Roberts* v. *United States Jaycees* (1984) 468 U.S. 609, 621), and of Rotary Clubs, which "rather than carrying on their activities in an atmosphere of privacy, seek to keep their 'windows and doors

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[9] "Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person * * *" (*Bell* v. *Maryland* (1964) 378 U.S. 226, 313, Goldberg, Warren & Douglas, JJ., concurring).

open to the world' " (*Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte* (U.S. May 4, 1987) 55 U.S.Law Week 4606, 4609, ____ U.S. ____). The United States Jaycees and Rotary Clubs, however, stand in sharp contrast to the Bohemian Club, a non-commercial private club that has "extremely selective" membership policies (Appx. A, p. 10) and "takes all measures necessary to insure privacy for members" (Appx. D, p. 47).

The freedom of association protects personal relationships "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" (*Roberts* v. *United States Jaycees* (1984) 468 U.S. 609, 620). The key factors include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent" to a particular association (468 U.S. 620). Under these criteria, the Club is a paradigm of the truly private, non-commercial, social association protected by the freedom of association:

> *Size.* The Club's by-laws strictly limit membership to 1,100 regular members and approximately 900 non-resident, associate, and other members (Admin.Record, pp. 713-719). The wait for admission is as long as thirteen years in some categories (Admin.Record, p. 680).
>
> *Purpose.* The Club activities are considered as "retreats from the outside world, and the Grove has been seen as a natural, rustic setting in which to enjoy male fellowship and celebrate the arts" (Appx. D, p. 48).
>
> *Policies.* The Club's "rules and traditions prohibit members and guests from engaging in commercial, trade or business activities while at the Club or its functions" (Appx. D, p. 45). The Club by-laws and rules strictly restrict all disclosure of Club activities to the public (Admin.Record, pp. 235-238, 737, 741). "At the Grove, access roads leading into the living and camping area are fenced, the entry roads have locked gates, and signs are posted along the perimeter to identify the area as private property. Fourteen security guards patrol the Grove at all times during the summer

events to prevent uninvited persons from entering" (Appx. D, p. 47).[10]

Selectivity. "[M]embership in the Club is open only to men connected professionally with or devoted to the arts. * * * Memberships are not based upon business achievements, and memberships cannot be purchased or sold. * * * The Club's membership standards and rules are strictly enforced" (Appx. D, p. 44). Even a guest at the Grove must be approved by the board of directors based on his merits and qualifications (Admin.Record, pp. 733-734).

Congeniality. The Club has a "warmth of fellowship unmatched in social club history" (Admin.Record, p. 658). "There is a suspension of disbelief at the Grove; a certain kind of magic; a certain kind of special illusion which is created there. This is part and parcel of the setting and the camaraderie and the psychological intimacy that the Grove allows" (Admin.Record, p. 365).

Thus, the Club's private social activities place it far into the protected end of the spectrum of personal associational relationships. The courts below and the Commission acknowledge that the Club's "common purpose is to enjoy the arts in an atmosphere of male camaraderie" and that "relationship among members is undoubtedly 'intimate' in associational terms," necessarily receiving constitutional protection (Appx. A, p. 10). The ruling below also acknowledges the credibility of the testimony that the presence of women would intrude upon the "intimate" associational activities of Club members (Appx. A, p. 19, n. 12).[11]

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[10] The Club by-laws provide that "none of the facilities shall at any time or in any manner be made available to the general public or to any outside group or organization" (Admin.Record, pp. 735, 738).

[11] Club member William F. Buckley, Jr., testified that the presence of women at the Grove "would make so critical a difference as far as I can see that I would certainly forfeit my sense of allegiance to it" (Admin.Record, p. 441). Former Governor Edmund G. Brown, who "disagree[d] with almost everything [Mr. Buckley] says," agreed with Mr. Buckley's testimony about the Club and its associational values (Admin.Record, p. 464). Governor Brown testified that the presence of

The ruling below holds, however, that the members' freedom of association is not violated, as "the Club members' relationship *with employees* cannot reasonably be termed 'intimate' " (Appx. A, p. 11; emphasis added). This misses the point: It is the "intimate" relationship among members that is threatened by the state regulation of the Club's employment practices. The state's intrusion into those protected activities (by requiring female employees pervasively throughout the Club's encampment) would destroy this "intimate" relationship among members. The reasoning of the ruling below proves too much: Under that reasoning, the state could, for example, require the Club to admit state officials to monitor all Club activities, under the theory that the Club members' relationship with the state monitors would not be "intimate."

The ruling below suggests, in the alternative, that any infringement of freedom of association "would be justified by the state's compelling interest in eradicating employment discrimination" (Appx. A, p. 11). However, government regulations limiting fundamental rights "must be narrowly drawn to express only the legitimate state interests at stake" (*Roe* v. *Wade* (1973) 410 U.S. 113, 155; see *Buckley* v. *Valeo* (1976) 424 U.S. 1, 44-45; *N.A.A.C.P.* v. *Button* (1963) 371 U.S. 415, 433, 438). The ruling below concedes that the application of the Fair Employment and Housing Act to the Club is "ambiguous" and "is not clear" (Appx. A, p. 4). The state has failed to draw with narrow specificity a statute covering the Club and its selection of employees involved with the Club's associational activities (see *N.A.A.C.P.* v. *Button* (1963) 371 U.S. 415, 433, 438).[12]

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women employees "would change the spirit of the organization" and would "destroy the Bohemian feeling" (Admin.Record, pp. 466, 468).

[12] Moreover, as discussed above (supra, p. 14), the state's motivation in applying the Act to the Club was *not* to eradicate employment discrimination. The trial court found that the state's "action before filing its accusation and in prosecuting the Club before the Commission reflects arbitrary and capricious conduct designed to unfairly and prejudicially bring enforcement proceedings against the Club because of its membership" (Clerk's Transcript on Appeal, p. 1034). The state singled out the Club as "a juicy target" simply because state officials viewed the

This Court should determine the important and novel question whether the freedom of association protects from governmental intrusion the selection by a private club of employees involved in the Club's private, social, associational activities.

Club members as "very, very rich and very, very famous" (Admin.Record, p. 1489). That is certainly not a "compelling interest."

The ruling below relies upon *Hishon* v. *King & Spaulding* (1984) 467 U.S. 69 as its sole authority for "the proposition that the impact, if any, of forced hiring of female employees on Club members' associational rights could be justified by the state's compelling interest in eliminating employment discrimination" (Appx. A, p. 12). But *Hishon* holds no such thing:

> "[I]n *Hishon* v. *King and Spaulding, supra,* * * * we readily rejected a large commercial law firm's claim to First Amendment protection for alleged gender-based discriminatory partnership decisions for associates of the firm. We found no need to inquire into any connection between gender as a condition of partnership and the speech of the law firm, and *we undertook no weighing of 'compelling' state interests against the speech interests of the law firm.* As a commercial enterprise, the law firm could claim no First Amendment immunity from employment discrimination laws, and that result would not have been altered by a showing that the firm engaged even in a substantial amount of activity entitled to First Amendment protection" (*Roberts* v. *United States Jaycees* (1984) 468 U.S. 609, 637, O'Connor, J., concurring; emphasis added).

In *Hishon*, the defendant law firm, a commercial business, had simply "not shown how its ability to fulfill such a function [working as commercial lawyers] would be inhibited by a requirement that it consider petitioner for partnership on her merits" (467 U.S. 78). Here, the Club's function would be destroyed if—as required by the Commission—the Club is compelled to hire women throughout the Club regardless of its activities.

III

A STATE COURT IS CONSTITUTIONALLY REQUIRED TO MAKE AN INDEPENDENT REVIEW OF THE ADMINISTRATIVE RECORD IN DETERMINING WHETHER A STATUTE VIOLATES THE FREEDOM OF ASSOCIATION OF PRIVATE CLUB MEMBERS.

In resolving First Amendment issues, the courts must make an independent examination of the whole record (*NAACP* v. *Claiborne Hardware Co.* (1982) 458 U.S. 886, 915-916, n. 5). Because of its erroneous view that, "as a matter of law," the freedom of association does not protect against governmental intrusion into the selection of private club employees, the Court of Appeal refused to make an independent examination of the record (Appx. A, p. 7 & n. 3).

Moreover, the Court of Appeal erroneously rejected the trial court's independent review of the record, on the erroneous theory that, as a matter of law, the associational rights affected by the Fair Employment and Housing Commission decision "do not rise to the level of fundamentally vested interests" (Appx. A, p. 7). Clearly, the freedom of association is "protect[ed] as a fundamental element of personal liberty" (*Roberts* v. *United States Jaycees* (1984) 468 U.S. 609, 618; see *Adcock* v. *Board of Education* (1975) 10 Cal.3d 60, 66). If the Court of Appeal intended to say that Club members' freedom of association was not "affected" by the application of the Fair Employment and Housing Act, the Court of Appeal is wrong. The trial court found —and the evidence is overpowering—that the Club members' associational activities would be drastically affected by the presence of female employees at private gatherings (Appx. C, p. 38).

Independent review is especially important in this case, where the evidence is contained in the administrative record before the Fair Housing and Employment Commission, rather than in a trial record before a jury or trial judge.

> " 'When the executive or the administrative process abridges constitutional rights, it is subject to closer scrutiny than otherwise, and ultimately it is the court rather than agency that must balance the competing interests' " (*Lebron v.*

Washington Metro. Area Transit Auth. (D.C. Cir. 1984) 749 F.2d 893, 897, n. 7; quoting *A Quaker Action Group v. Morton* (D.C. Cir. 1975) 516 F.2d 717, 723).

The Court of Appeal's total rejection of any independent examination of the record by the courts is without precedent. In considering the merits of the First Amendment issues in this case this Court should make independent examination of the whole record or, at the very least, remand the case to the Court of Appeal for such a review.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal or, in the alternative, regard and grant this jurisdictional statement as a petition for writ of certiorari.

Respectfully submitted,

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(Appendices follow)

Appendix A

Certified for Publication

In the Court of Appeal of the State of California
First Appellate District
Division One
A024988
Super.Ct.No.
119026

Bohemian Club,
Plaintiff and Appellant,

v.

Fair Employment and Housing Commission,
State of California,
Defendant and Appellant,

Department of Fair Employment
and Housing et al.,
Intervenors and Appellants.

[Filed Nov. 20, 1986]

NEWSOM, J.—The Department of Fair Employment and Housing (hereafter Department) filed an accusation against the Bohemian Club (hereafter Club) for alleged violations of the Fair Employment and Housing Act (hereafter FEHA). The accusation alleged that the Club, as an employer covered by the FEHA, had—in violation of the act—pursued a discriminatory hiring policy which systematically excluded women from all temporary and permanent jobs at its Monte Rio camp and most of such positions at its San Francisco location.

The Club denied that it is a covered employer, and, in the alternative, asserted that male gender is a bona fide occupational qualification. It also asserted that the FEHA is preempted by Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e) (Title VII), which does not include private clubs in its definition of employers subject to its antidiscrimination provisions.

The procedural background may be summarized as follows. An administrative law judge heard the case and ruled that male gender is a bona fide occupational qualification at the Club. The Fair Employment and Housing Commission (hereafter Commission) rejected the judge's findings and conclusions and issued its own findings and decision ordering the Club to institute an affirmative action program to employ women in both San Francisco and Monte Rio.

Pursuant to section 1094.5 of the Code of Civil Procedure, the Club filed a petition for a writ of mandamus in the superior court.

The petition did not name the Department and its director as real parties in interest; they, however, opposed the petition and filed their own petition in intervention to set aside the Commission's ruling purporting to deny classwide backpay. While the Commission agreed that the backpay ruling should be set aside, the trial court, in granting the Club's petition, denied the petition in intervention as moot.

On December 1 and 3, a hearing was held, after which the trial court issued a tentative ruling granting the Club's petition. In the aftermath of attendant publicity, the Commission learned for the first time that the trial judge had participated in the Club's activities, and the Commission's request that he disqualify himself was denied.

The Club's petition was granted. The trial court held that: (1) Title VII preempts the FEHA; and (2) even if the FEHA is not preempted, male gender is a bona fide occupational qualification. The court did not merely order the Commission to set aside its decision, but also dismissed the underlying accusation against the Club. While the Club was awarded costs, its cost bill was subsequently taxed insofar as it claimed attorney's fees.

Both the Commission and the Department appealed.[1] The Club also appealed from the order denying it attorney's fees.

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[1] We will hereafter refer to the Commission and Department together as appellants.

A review of the pertinent factual context reveals the following. The Bohemian Club is a distinguished private nonprofit association whose membership is limited to men professing devotion to the arts. It has a long and honorable history since its inception more than a century ago and it occupied an important place in the history of literature in early-day San Francisco. Its approximately 2,000 members are chosen by a highly selective process. Potential members are interviewed extensively and must be devoted to the arts, or willing to participate in artistic activities.

The Club's activities take place at two different locations: the City Club in San Francisco and the Grove, a 2,500 acre camping area near Monte Rio, California. Members attend concerts, theatrical and musical productions, oratorical presentations, lakeside talks and other functions.

The Club permanently employs 90 men in managerial, clerical, craft, food preparation and service, cleaning and personal service positions at its San Francisco location. Women are employed in positions which do not require their presence at Club functions. In accordance with this policy, women work in accounting and administrative positions and at the print shop. Women also clean rooms and may be hired as food servers for members' private parties. At the Grove, a permanent work force of about 10 employees is maintained. These permanent staff members supervise a temporary work force of 250 men hired during the annual retreats at the Grove.

The Club's general manager testified that employees are primarily hired through union referrals and from the area around the Grove. When the union cannot provide an employee, the Club goes to the state employment department and sometimes even hires "off the street." Don Hiemforth, a member of the local Food Servers' Union, who has frequently worked at the Club, testified that, to his knowledge, referrals from the union have never been refused.

One waiter frequently employed at the Club testified concerning the Club's policy against fraternization between employees and members and guests. Waiters, for example, are not permitted to remain in the dining room at the City Club during the

Thursday night club functions staged after dinner has been served. Such employees are strictly instructed to maintain relations with members at a minimal, exclusively business level.

Similar rules at the Grove prohibit fraternization between employees and members. The Club's general manager conceded that Grove employees are prohibited from fraternizing with members, and testified as well that employees are not permitted use of the swimming facilities.

The first legal question to be addressed in the present appeal is whether the Bohemian Club, as a private nonprofit corporation, is subject to the antidiscrimination provisions of the Fair Employment and Housing Act. (Gov. Code, § 12920 et seq.)

The Fair Employment and Housing Act is a comprehensive scheme for the realization of the state's public policy "to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age." (Gov. Code, § 12920.)

Under Government Code section 12926, subdivision (c), the term employer "does not include a religious association or corporation not organized for private profit." The Club accordingly contends that, as a nonprofit corporation, it is exempted from the antidiscrimination provisions of the FEHA. Appellants assert however, that the word "religious" modifies both "association" and "corporation not organized for private profit." (Gov. Code § 12926, subd. (c).) Thus, under appellants' interpretation the exemption would only apply to the Club if it were a religious nonprofit corporation. The language at issue is ambiguous; it is not clear whether "religious" only modifies "association" or whether it also refers to a nonprofit corporation. This ambiguity is resolved, however, by a review of the pertinent legislative history. (*Sand v. Superior Court* (1983) 34 Cal.3d 567, 570 [194 Cal.Rptr. 480, 668 P.2d 787].)

When Government Code section 12926, subdivision (c) was originally enacted, the term employer did not "include a social club, fraternal, charitable, educational or religious association or

corporation not organized for private profit." (Lab. Code, § 1413, subd. (d).) Under the amended version, however, the Legislature deleted social clubs, as well as fraternal, charitable, and educational organizations from the statutory exemption. "Where the amendment of a statute consists of the deletion of an express provision, the presumption is that a substantial change in the law was intended." (*Subsequent Injuries Fund v. Industrial Acc. Com.* (1963) 59 Cal.2d 842, 844 [31 Cal.Rptr. 477, 382 P.2d 597] citing *Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 231 [273 P.2d 5]; see also *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 26 [157 Cal.Rptr. 706, 598 P.2d 866]; *Ladd v. Board of Trustees* (1972) 23 Cal.App.3d 984, 990 [100 Cal.Rptr. 571].)

By specifically deleting "social clubs" from the statutory exemption, it appears that the legislature no longer wished to afford such entities an exemption from the nondiscrimination policies of the FEHA. Moreover, the deletion of charitable organizations, which are by nature nonprofit, clearly indicates that the term religious was intended to modify both "association" and "corporation not organized for private profit." Had the legislature simply intended, as respondent suggests, to exempt all nonprofit corporations, it seems unlikely that it would have deleted charitable organizations from the exemption provision. In any event, we conclude that the adjective "religious" must be read as modifying both "association" and "corporation not organized for private profit." And, upon this reading of the statute, we conclude that only religious associations or nonprofit corporations are exempt from the antidiscrimination provisions of FEHA, and that appellants do not fall within this exempt category.[2]

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[2] The Club relies on *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72 [219 Cal.Rptr. 150, 707 P.2d 212] for the proposition that nonprofit corporations are not considered employers under the FEHA. In *Isbister*, the Boys' Club argued that the FEHA contained an express exemption for " 'association[s] or corporation[s] not organized for private profit" and that "by excluding 'nonprofit' groups from the housing and employment laws, the Legislature demonstrated its intent that the phrase 'business establishments,' as used in the Unruh Act, should have a strictly commercial meaning." (*Id.*, at p. 83.)

Appellants assert that the trial court was limited to determining whether substantial evidence supported the Commission's findings, and that it erred in using the independent judgment standard of review.

Section 1094.5 of the Code of Civil Procedure authorizes judicial review of administrative decisions. When it is claimed that the administrative findings are not supported by the evidence, "the statute contemplates that the court will apply either the independent judgment test or the substantial evidence test . . . ." (*Kerrigan v. Fair Employment Practice Com.* (1979) 91 Cal.App.3d 43, 48 [154 Cal.Rptr. 29].) "[I]f the order or decision of the agency substantially affects a fundamental vested right, the court, in determining under section 1094.5 of the Code of Civil Procedure whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. If, on the other hand, the order or decision does not substantially affect a fundamental vested right, the trial court's inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in light of the whole record." (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 44-45 [112 Cal.Rptr. 805, 520 P.2d 29].) "Whether an administrative decision substantially affects a fundamental, vested right so as to require independent judgment review must be decided on a case-by-case basis."

The court rejected this contention and cited the FEHA's express provision that " 'nothing contained in this part shall be construed, *in any manner or way,* to limit or restrict the application of Section 51 of the Civil Code [i.e., the Unruh Act].' " (*Id.,* at p. 84.) Thus, the court did *not* interpret the FEHA's exemption provision. And significantly, the exemption provision was only quoted in part; the word "religious," which precedes, and thus modifies, "association and corporation not organized for private profit," was omitted. It is thus clear that our high court did not address the question here at issue—namely, whether the legislative history of the FEHA indicates an intent to exempt a private social club, which also happens to be a nonprofit corporation, from the Act's antidiscrimination provisions.

(*Kerrigan v. Fair Employment Practice Com., supra,* 91 Cal.App.3d at p. 49.)

The Club contends that "it is the constitutional right of every person to close his . . . club to any person . . . ." (*Bell v. Maryland* (1964) 378 U.S. 226, 313 [12 L.Ed.2d 822, 848, 84 S.Ct. 1814]), and that accordingly, the forced hiring of women would violate the Club members' right of freedom of association, a fundamental right triggering the independent judgment test.

In *Adcock v. Board of Education* (1973) 10 Cal.3d 60 [109 Cal.Rptr. 676, 513 P.2d 900], our high court stated that it is "essential to adopt a special rule or standard to review administrative decisions when constitutional rights are assertedly limited. [Citations.]" (*Id.,* at pp. 65-66; see also *Kerrigan v. Fair Employment Practice Com., supra,* 91 Cal.App.3d at p. 52; *Franklin v. Leland Stanford Junior University* (1985) 172 Cal.App.3d 322, 330-331 [218 Cal.Rptr. 228].) Because the protected constitutional right of free speech was manifestly implicated in *Adcock,* the court concluded that the independent judgment test was the proper standard of review. (10 Cal.3d at p. 69.)

For reasons we will discuss at length later in this opinion, we find in the present record that such associational or privacy interests of members as are implicated do not rise to the level of fundamental vested interests for which an independent judicial evaluation and judgment are traditionally required. We conclude, on the contrary, that the conventional substantial evidence test was the proper standard for the trial court's review of the administrative record.[3,4]

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[3] We will add, however, that our conclusions on the substantive issues presented in this appeal do not depend upon which standard of review should have been employed by the trial court. As will be apparent, given the state of the evidence we are able to resolve such issues as a matter of law and without regard to whether the trial court was obliged to limit its review by the substantial evidence rule or free to exercise its independent judgment.

[4] As was said in *Guesby v. Kennedy* (D.Kan. 1984) 580 F.Supp. 1280, "We believe that in the context of an employment relationship, the

Among the Club's principal substantive contentions is that the forced hiring of women violates members' constitutional right of association; therefore, it is argued the FEHA's inclusion of private clubs in its antidiscrimination provisions is unconstitutional. In so arguing, the Club relies on the following language from *Gilmore v. City of Montgomery* (1974) 417 U.S. 556 [41 L.Ed.2d 304, 94 S.Ct. 2416]: " 'The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. . . . Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.' " (*Id.*, at p. 575 [41 L.Ed.2d at p. 320]; quoting *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, 179-180 [32 L.Ed.2d 627, 641, 92 S.Ct. 1965] (dis. opn. of Douglas, J.) The Club also directs us to the following language of our Supreme Court: "[p]rejudice and bigotry in any form are regrettable . . . [although] it is the constitutional right of every person to close his home or club to any person . . . " (*Bell v. Maryland, supra,* 378 U.S. 226, 313 [12 L.Ed.2d 882, 848] (conc. opn. of Goldberg, J.).)

Quite apart from the fact that *Gilmore* and related cases—unlike the case at bench—involve the relationship of member to member and not member to employee, these sweeping statements have been significantly modified by subsequent decisions of our high court. In *Roberts v. United States Jaycees* (1984) 468 U.S. 609 [82 L.Ed.2d 462, 104 S.Ct. 3244], in upholding the application of a Minnesota human rights statute compelling the Jaycees to accept women as full voting members, the court flatly rejected the Jaycees' claim that the inclusion of women would violate their right to freedom of association, observing that the Constitution protected only "intimate" and "expressive" associational rights. The first aspect of associational freedom protects "the formation and preservation of certain kinds of highly personal relationships . . . . " (*Id.*, at p. 618 [82 L.Ed.2d at p. 471].) An individual's choice "to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relation-

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scope of the right of association is much more limited than in the context of membership in an organization." (*Id.*, at p. 1284.)

ships in safeguarding the individual freedom that is central to our constitutional scheme." (*Id.*, at pp. 617-618 [82 L.Ed.2d at p. 471].) The second aspect of associational freedom encompasses an individual's "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievences [sic], and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." (*Id.*, at p. 618 [82 L.Ed.2d at p. 471].)

Because the Jaycees did not have selective membership standards, the only criteria being age and sex, the court found that no "intimate" associational rights would be infringed by the inclusion of women as full voting members. (*Id.*, at p. 621 [82 L.Ed.2d at p. 473].) The *Roberts* court also rejected the Jaycees' claim that their right of "expressive" association would be violated by the inclusion of women. While recognizing that the Jaycees dominant purpose had been to further the social and political views of young *men*, the court refused to entertain what it termed "stereotypical" assumptions that the presence of women members would thwart or stultify these "expressive" activities necessary to implementing that purpose. (*Roberts v. United States Jaycees, supra*, 468 U.S. at p. 628 [82 L.Ed.2d at p. 479].)

It bears repetition that we are of course confronted here with the impact of women *employees* upon the Club, and nothing in the discussion which now follows bears upon the wholly separate issue of women as *members*. And, in assessing this impact, our first inquiry is whether hiring females would unduly interfere with the Club's "intimate" associational rights under *Roberts*.[5] Also, in determining the intimacy of a relationship, and the corresponding entitlement to protection from state intrusion, pertinent factors we should consider include: "size, purpose, policies, selectivity, con-

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[5] Our high court held that "even if enforcement of the Act cause[d] some incidental abridgement of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." (*Roberts v. United States Jaycees, supra*, 468 U.S. at p. 628 [82 L.Ed.2d at p. 478].)

geniality, and other characteristics that in a particular case may be pertinent."(*Id.*, at p. 620 [82 L.Ed.2d at p. 473].)

As we have said, the Club's membership consists of approximately 2,000 men whose common purpose is to enjoy the arts in an atmosphere of male camaraderie. But while the Club's membership policy is extremely selective, and the consequent relationship among members is undoubtedly "intimate" in associational terms, the same cannot be said for the associational rights of members vis à vis employees. As the Club's manager testified, little is known concerning employees at hiring. Such testimony was corroborated by a member of the local food servers union who declared that, to his knowledge, the Club had never refused anybody referred by the union. In short, the record amply demonstrates that the Club's hiring procedure is not selective.

We are obliged to carefully consider as well whether the Club's purposes of promoting male fellowship and appreciation of the arts would be undermined by hiring female employees in selective capacities. In this respect, it seems highly relevant that, according to the Club's manager, employees are prohibited from fraternizing with the members. It is difficult to understand how, for example, the presence of women cooks or food servers would inhibit realization of the Club's purposes in view of this nonfraternization rule. Indeed, the existence of that rule renders implausible any assertion that the Club' s "intimate" associational rights would be infringed by hiring female employees. Nothing in the present record demonstrates that the members have so "highly personal a relationship" with employees as to warrant protection from state intrusion.

The Club nevertheless contends that the mere presence of women on a regular basis "would change the spirit of the organization" and would "destroy the Bohemian feeling." The eminent author and editor, William F. Buckley, Jr.—himself a Bohemian—testified that the presence of women employees at the Grove "would make so critical a difference as far as I can see

that I would certainly forfeit my sense of allegiance to it."[6] Such feelings,—however sensitive and genuine,—are not afforded constitutional protection, however, for—we repeat—the right to freedom of association only protects "highly personal" relationships (*Roberts v. United States Jaycees, supra,* 468 U.S. at p. 618 [82 L.Ed.2d at p. 471]),[7] and the Club members' relationship with employees cannot reasonably be termed "intimate" within the letter or spirit of the high court's careful exegesis of that term.

The Club makes a corollary contention that hiring women employees would violate its *privacy* rights, citing *White v. Davis* (1975) 13 Cal.3d 757 [120 Cal.Rptr. 94, 533 P.2d 222], for the proposition that " '[t]he right of privacy . . . [encompasses the] freedom to *associate* with the people we choose.' " (*Id.*, at p. 774); as we have already said, however, *Roberts v. United States Jaycees, supra,* 468 U.S. 609, establishes the rule that the constitutional right of association protects only "intimate" relationships, while here members' relationships with employees are neither "highly personal" nor "intimate."

Even were we to assume arguendo that the members' associational rights would somehow be constricted by the Club's forced hiring of women, we think such infringement would be justified by the state's compelling interest in eradicating employment discrimination. Again we are guided by high authority. In *Hishon v. King & Spalding* (1984) 467 U.S. 69 [81 L.Ed.2d 59, 104 S.Ct. 2229], plaintiff asserted that she had been unlawfully denied partnership status in a law firm on the basis of sex. The Supreme Court found that plaintiff had stated a cognizable claim under Title VII and rejected the law firm's claim of infringement of its associational rights, stating: " '[I]nvidious private discrimination may be characterized as a form of exercising freedom of associa-

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[6] It may be observed that, as the record here shows, during World War II the Club employed women without apparent damage to its tradition.

[7] We need not address the question of whether the Club's "expressive" right of association would be infringed because the thrust of the Club's argument is that the presence of women would destroy the initimate all-male atmosphere.

tion protected by the First Amendment, but it has never been accorded affirmative constitutional protections.' " (*Id.*, at p. 78 [81 L.Ed.2d at pp. 68-69].) In a concurring opinion, Justice Powell noted that laws barring discrimination may well infringe first amendment rights: "The court's opinion properly reminds us that 'invidious private discrimination . . . has never been accorded affirmative constitutional protections.' . . . This is not to say, however, that enforcement of laws that ban discrimination will always be without cost to other values, including constitutional rights. Such laws may impede the exercise of personal judgment in choosing one's associates or colleagues." (*Id.*, at p. 80, fn. 4 [81 L.Ed.2d at p. 70].) We read *Hishon* as authority for the proposition that the impact, if any, of forced hiring of female employees on Club members' associational rights could be justified by the state's compelling interest in eliminating employment discrimination.

The Club also asserts that the Fair Employment and Housing Act's inclusion of private clubs within its antidiscrimination provisions is inconsistent with, and thus superseded by, Title VII, which in section 701, subdivision (b) specifically exempts private clubs from its antidiscrimination strictures.[8]

In deciding whether a federal law preempts a state statute, "[o]ur task is 'to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 526 [51 L.Ed.2d 604, 614, 97 S.Ct. 1305].) The United States Supreme Court has repeatedly stated that "[c]ongress enacted Title VII to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin." (*Kremer v. Chemical Construction Corp.* (1982) 456 U.S. 461, 468 [72 L.Ed.2d 262, 272, 102 S.Ct. 1883], citing

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[8] Section 701, subdivision (b) of Title VII provides that the term "employer" does not include "a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 . . . ." (42 U.S.C. § 2000e(b).)

Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36, 44 [39 L.Ed.2d 147, 155, 94 S.Ct. 1011] and *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 800 [36 L.Ed.2d 668, 676-677, 93 S.Ct. 1817].) With these principles in mind, we examine the question of whether the FEHA is preempted by Title VII.

As the Club observes, the private club exemption in Title VII was, in the words of Senator Humphrey, designed to protect "the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis." (110 Cong.Rec. (June 13, 1964) 13697.)[9] Accordingly, the Club argues, under section 1104 of Title XI, a preemption provision of the Civil Rights Act, the FEHA's inclusion of private clubs is fatally inconsistent with Title VII and cannot stand. Section 1104 provides: "[N]othing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, not shall any provision of this Act be construed as invalidating any provision of State law unless such provision is *inconsistent* with any of the purposes of this Act, or any provision thereof." (42 U.S.C. § 2000h-4.) (Italics added.)

The Club also cites *Kemerer v. Davis* (E.D. Mich. 1981) 520 F.Supp. 256, for the proposition that application of antidiscrimination legislation to private clubs is inconsistent with Title VII. In *Kemerer,* the court held that the application of the Civil Rights Act of 1866 (42 U.S.C. § 1981) to the employment practices of a private club would conflict with section 701, subdivision (b) of Title VII. The court stated: "If applied literally, 1981 would reach within private establishments pro-

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[9]See also *EEOC v. St. Joseph Hospital East Inc.* (W.D. Tenn. 1979) 19 F.E.P. 1439, 1440 ("The legislative history of Title VII rather clearly indicates that Congress drafted § 701(b) to preserve social and fraternal organizations of self-controlled membership as a refuge for private associational values."); *Fesel v. Masonic Home of Delaware, Inc.* (D.Del. 1977) 428 F.Supp. 573, 577 ("In Title II, Congress sought to preserve a small non-commerical enclave for the unfettered exercise of the freedom of association . . . .")

tected by the 1964 Act; the two statutes, thus, are in conflict." (*Id.*, at p. 258.) The court concluded that private clubs were impliedly exempted from the provisions of 1981 by virtue of the conflicting and therefore superseding exemption set forth in Title VII. (*Id.*, at p. 260.) (See also *Hudson v. Charlotte Country Club, Inc.* (W.D.N.C. 1982) 535 F.Supp. 313, 317.)[10]

Kemerer involved two *federal* statutes, however. In *Kemerer v. Chemical Construction Corp.* (1981) 456 U.S. 461 [72 L.Ed.2d 262, 102 S.Ct. 1883], the court discussed the relationship between two federal statutes and observed that "whenever possible, statutes should be read consistently." (*Id.*, at p. 468 [72 L.Ed.2d at p. 271].) This was accomplished in *Kemerer* by finding the earlier federal statute preempted by the later, thereby effectively incorporating a subsequently enacted exemption into the 1866 Civil Rights Act. (See also *Hunter v. Erickson* (1969) 393 U.S. 385, 388 [21 L.Ed.2d 616, 620, 89 S.Ct. 557].) The question presented here, however, is whether *states* have the power to enact broader antidiscrimination legislation than that provided by Title VII.

In arguing that the states retain such power, appellants rely on section 708, the "savings" clause of title VII, which provides as follows: "[n]othing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State of political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

In *Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85 [77 L.Ed.2d 490, 103 S.Ct. 2890], our nation's high court said of section 708: "... Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII, see § 708, 78 Stat 262, 42 USC § 2000e-7 .... Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit." (*Id.*, at p. 103 [72 L.Ed.2d at

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[10] For a contrary view, see *Guesby v. Kennedy, supra,* 580 F.Supp. 1280, 1286, where the court held that Title VII's private club exemption does not apply to § 1981 actions.

p. 505].) Thus, states may extend "their nondiscrimination laws to areas not covered by Title VII . . . ." (*Ibid.*) In Government Code section 12926, subdivision (c), California's Act extends its nondiscrimination policies to private clubs, an area not covered by Title VII, a result section 708, as interpreted in *Shaw,* permits.

A number of cases have interpreted section 708 as preserving state laws which further Title VII's objective of eliminating employment discrimination. In *Grann v. City of Madison* (7th Cir. 1984) 738 F.2d 786, for example, the court held that section 708 was designed to save state laws which are "consistent with the goals of Title VII while invalidating those that hindered protection of civil rights." (*Id.*, at p. 792.) The court also noted that section 1104, the preemption provision upon which the Club relies, "should not be construed to undermine state efforts [in eliminating employment discrimination.]" (*Id.*, at p. 791.)

We find further support for appellants' position in *Thomas Pub. Co. v. Division of Human rights* (S.D.N.Y. 1978) 456 F.Supp. 1104, rejecting the argument that Title VII preempted New York's Human Rights Law and holding that "even if the Human Rights Law and Title VII of the Civil Rights Act were inconsistent with respect to pregnancy disabililty benefits, this inconsistency would not be of a nature requiring supersedure or preemption of the state law by federal law." (*Id.*, at p. 1108.) The court concluded that the Human Rights Law in no way interfered with Title VII's purpose of eliminating employment discrimination and hence was not subject to preemption. (*Ibid.*) And in *Local 246, Util. Wkrs. U. v. Southern California Edison Co.* (C.D.Ca. 1970) 320 F.Supp. 1262, 1264, it was held that the purpose of section 1104, the preemption provision, and section 708, the "savings" clause, "is to insure preservation of state laws which parallel the Federal Act in prohibiting employment discrimination, such as California's recently amended Fair Employment Practices Act."

We similarly find that, even though the FEHA's inclusion of private clubs may be facially inconsistent with Title VII, the inconsistency is not "of a nature requiring supersedure or preemption of the state law by federal law." (*Thomas Pub. Co. v. Division of Human Rights, supra,* 456 F.Supp. at p. 1108.) The

inclusion of private clubs in no way hinders Title VII's overriding objective of eliminating employment discrimination. Contrary to the Club's simplistic interpretation of section 1104, the term "inconsistent" must be interpreted by focusing primarily upon whether a law furthers Title VII's goal of eliminating employment discrimination. Laws which *hinder* the protection of civil rights are inconsistent with Title VII's purpose, and thus subject to preemption. (*Grann v. City of Madison, supra,* 738 F.2d at p. 792.)

In our view, the fact that Congress has acted to limit the scope of federal regulation does not necessarily indicate an intent to preempt a state's exercise of its police power. As our high court has stated: "[T]he intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field." (*Savage v. Jones* (1912) 225 U.S. 501, 533 [56 L.Ed. 1182, 1195, 32 S.Ct. 715]; see also *Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 146 [10 L.Ed.2d 248, 259, 83 S.Ct. 1210].) In the area of discrimination, the police power of states to regulate private discrimination has often been sustained despite lack of federal coverage of such discrimination, either by congressional choice or constitutional limitation. In *Moose Lodge No. 107 v. Irvis, supra,* 407 U.S. 163, for example, the court held that the equal protection clause could not be invoked to prohibit the discriminatory actions by a private club which held a state liquor license. In contrast, in *Roberts v. United States Jaycees, supra,* 468 U.S. 609, the *state's* right to regulate discrimination in a private club's membership selection was upheld.

Appellants contend, and we agree, that limited federal regulation of discrimination does not necessarily indicate a congressional intent to preempt state laws with broader antidiscrimination provisions. We subscribe to the view that congressional *reluctance* to extend coverage of this antidiscrimination law to private clubs acting as employers is not a *purpose* of the statute. And as one commentator in the field has succinctly said, "... congressional concern ... [over] congressional refusal to extend a federal statute to include particular

entities is hardly a prohibition of the states doing so." (Garcia, *Title VII Does Not Preempt State Regulation of Private Club Employment Practices* (1983) 34 Hastings L.J. 1107, 1130.)

We follow the authority of the United States Supreme Court: "Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit." *Shaw v. Delta Airlines, supra,* 463 U.S. at p. 103 [77 L.Ed.2d at p. 505]. Because states can extend antidiscrimination laws to areas not covered by Title VII, we conclude that the FEHA is not preempted by Title VII.[11] (*Ibid.*)

Another of the Club's key contentions is that male gender is a bona fide occupational qualification for Club employees which justifies its exclusion of female employees.

The Fair Employment and Housing Act provides that a discriminatory employment practice is *not* unlawful if it is based upon a "bona fide occupational qualification" (hereafter BFOQ). (Gov. Code, § 12940.) At the same time, however, the availability of a BFOQ defense is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex." (*Dothard v. Rawlinson* (1977) 433 U.S. 321, 334 [53 L.Ed.2d 786, 800, 97 S.Ct. 2720]; see also *County of Alameda v. Fair Employment & Housing Com.* (1984) 153 Cal.App.3d 499, 506 [200 Cal.Rptr. 381]; *Long v. State Personnel Bd.* (1974) 41 Cal.App.3d 1000, 1016 [116 Cal.Rptr. 562].) Hence, "the principle of nondiscrimination requires . . . that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." (*Weeks v. Southern Bell Telephone & Telegraph Company* (5th Cir. 1969) 408 F.2d 228, 235; see also

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[11] The Club further contends that the state may not exercise its police power to regulate private discrimination when such regulations are inconsistent with the purpose of federal law. This contention, however, is subsumed within the general question of whether Title VII preempts the Fair Employment and Housing Act and accordingly, need not be separately addressed.

Usery v. Tamiami Trail Tours, Inc. (5th Cir. 1976) 531 F.2d 224, 228 fn. 10.) Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also "bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities . . ." in order to reduce the BFOQ necessity. (*Hardin v. Stynchcomb* (11th Cir. 1982) 691 F.2d 1364, 1370-1371; see also *Gunther v. Iowa State Men's Reform.* (8th Cir. 1980) 612 F.2d 1079, 1086, cert. den. (1980) 446 U.S. 966 [64 L.Ed.2d 825, 100 S.Ct. 2942].)

The Fair Employment and Housing Commission has interpreted the BFOQ defense in a manner incorporating all of the federal requirements necessary for its establishment. Under the Commission's regulations: "Where an employer or other covered entity has a practice which on its face excludes an entire group of individuals on a basis enumerated in the Act (*e.g.*, all women or all individuals with lower back defects), the employer or other covered entity must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined." (Cal. Admin. Code, tit. 2, § 7286.7, subd. (a).)

"(a) Among situations which will not justify the application of the BFOQ defense are the following:

"(1) . . . . . .

"(2) . . . . . .

"(3) Customer preference for employees of one sex;

"(4) The necessity for providing separate facilities for one sex; or

"(5) The fact that members of one sex have traditionally been hired to perform the particular type of job.

"(b) Personal privacy considerations may justify a BFOQ only where:

"(1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and

"(2) It would be offensive to prevailing social standards to have an individual of the opposite sex present, and

"(3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

"(c) Employers or other covered entities shall assign job duties and make other reasonable accommodation so as to minimize the number of jobs for which sex is a BFOQ." (Cal. Admin. Code, tit. 2, § 7290.8).

The standards of the Commission are thus seen to be in harmony with federal law regarding the availability of a BFOQ defense. And, as the Commission correctly observes, its interpretation of the act it enforces is entitled to great respect. *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 491 [156 Cal.Rptr. 14, 595 P.2d 592]; *Dermegerdich v. Rank* (1984) 151 Cal.App.3d 848, 851 [199 Cal.Rptr. 30].

The Club argues that the presence of women employees would undermine the essence of its business operation, and that accordingly, male gender is a valid BFOQ under the FEHA. The Club cites the following testimony in support of its contention that the presence of women would destroy the essence or character of its operations. In the words of former Governor Edmund G. Brown: "[W]hat really is important is the spirit of camaraderie, the male camaraderie where men get together and they are free of the element of the battle of the sexes or the competition or distraction of having the other sex present. It is a single-sex gathering, and that is a very special thing." Yet another member commented: "It is a social experience, the kind that this particular club seeks to provide you, that requires a total affinity of gender. People do behave differently where there are women . . . It's an argument that when there are women waitresses, the situation alters. And it would certainly alter in the dining circle or in the auditorium or anywhere else in that camp."[12] Other testimony, however, indicated that the Club had never received complaints about one of

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[12] We intend no denigration of the sincerity or accuracy of such sentiments. They are, however, to be measured against the counter-

the Club's longstanding female employees, Ms. Lily Lum, who works as a food server during lunch at the City Club. Two cases cited by appellants, *Diaz v. Pan Am. World Airways, Inc.* (5th Cir. 1971) 442 F.2d 385, cert. den. (1971) 404 U.S. 950 [30 L.Ed.2d 267, 92 S.Ct. 275], and *Fernandez v. Wynn Oil Co.* (9th Cir. 1981) 653 F.2d 1273, refute the Club's legal contention that customer preference can form the basis of a BFOQ defense.

In *Diaz,* an employer attempted to justify its exclusion of male flight attendants by claiming that female flight attendants provided a more pleasant environment. Despite evidence produced by the airlines that passengers overwhelmingly preferred female flight attendants, the court rejected the BFOQ defense, explaining: "We do not feel this alone justifies discriminating against all males. . . . Before sex discrimination can be practiced, it must not only be shown that it is impracticable to find the men that possess the abilities that most women possess, but that the abilities are *necessary* to the business, not merely tangential." (442 F.2d 385, 388-389.) Thus, because the essence of the airline's business was the safe transport of passengers, and the pleasant atmosphere created by female flight attendants was merely tangential thereto, the court concluded that female gender was not a BFOQ (*Id.*, at p. 389.)

In *Fernandez*, the court again rejected a BFOQ defense, in the face of evidence which showed that South American customers might refuse to deal with women. The court found "no *factual* basis for linking sex with job performance." (653 F.2d 1273, 1276; italics added.) Customer preference was considered irrelevant because a woman could perform the job as readily as a man. Both *Fernandez* and *Diaz* stand for the proposition that BFOQ defenses cannot be established on the basis of stereotypical gender-based assumptions.

In the case at bench, the evidence overwhelmingly establishes that club members prefer male employees. The preference is presumably based upon assumptions concerning the inhibiting effect women employees might have upon men. These are,

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vailing constitutional rights of persons to be free from invidious discrimination in hiring.

however, mere stereotypical assumptions, lacking in any factual basis. Moreover, because of the nonfraternization policy and lack of selectivity in hiring employees, such male fellowship as might exist between club members and employees is clearly in a legal sense tangential. (*Diaz v. Pan Am. World Airways, Inc., supra,* 442 F.2d at pp. 388-389.)

The trial court erred in disregarding the principles laid down in *Fernandez* and *Diaz* as inapposite for the reason that, in its view, those cases dealt with *commercial* enterprises. That the Club is a private club does not exempt it from high legal authority which unequivocally declares that employment decisions cannot be predicated upon "stereotyped characterizations of the sexes." (*Dothard v. Rawlinson, supra,* 433 U.S. at p. 333 [53 L.Ed.2d at p. 800]; see also *City of Los Angeles Dept. of Water & Power v. Manhart* (1978) 435 U.S. 702, 707 [55 L.Ed.2d 657, 664-665, 98 S.Ct. 1370], on remand 577 F.2d 98; *Rosenfeld v. Southern Pacific Company* (9th Cir. 1971) 444 F.2d 1219, 1224-1225; *Thorne v. City of El Segundo* (9th Cir. 1983) 726 F.2d 459, 468, cert. den. 469 U.S. 979 [83 L.Ed.2d 315, 105 S.Ct. 380].) As an employer subject to the provisions of the FEHA, the Club must abide by the same rules which govern all California employers.

As we have already said, while the relationship among club members is certainly not commercial, that between employees and members can be described as almost exclusively commercial in nature. Employees are hired "sight-unseen" through union referrals. As earlier noted, the Club's own manager testified that very little is known about employees when they are hired. Most positions do not require written applications. The parties, in fact, stipulated that applications, when required, ask for only minimal personal information, and the only selection criteria in the hiring process are gender and the appearance of ability to do the job. At Monte Rio, employees are hired as seasonal laborers. The relationship between members and employees can fairly be described as transitory and business-like, rather than intimate.

The Club also contends that its members' privacy interests establish a BFOQ, noting that many shower and bathroom facilities are unenclosed and that members walk about the camp in various states of undress. Claims of a BFOQ based on privacy

interests have been upheld if the job actually requires the employee to carry out such intimate duties. (*Fesel v. Masonic Home of Del., Inc.* (D.Del. 1978) 447 F.Supp. 1346, affd. (3d Cir. 1979) 591 F.2d 1334.)

Club members' privacy interests, however, need not be threatened because enclosed shower and bathroom facilities are available. If a member chooses not to use the enclosed facilities, no legally enforceable right of privacy is impaired. Thus, in *Forts v. Ward* (2d Cir. 1980) 621 F.2d 1210, 1217, the court ordered shower screens and sleeping garments for prison inmates, refusing to hold that the inmates' privacy interests encompassed a preference for sleeping nude, when such preference would eliminate equal employment opportunities for male guards. Similarly, Club members' privacy interests do not encompass a legally protectible right to use unenclosed bathroom or shower facilities.

In sum, *Diaz* and *Fernandez* establish that customer preference cannot from the basis of a BFOQ defense. Finding the reasoning of these authorities persuasive, and for all of the reasons we have stated, we also conclude that male gender is not a BFOQ for Club employees.

Two remaining issues require only brief discussion.

First is the Club's contention that, in finding appellants' conduct arbitrary and capricious, the trial court bound itself to award the Club attorney fees under Government Code section 800, and erred in refusing such fees. We disagree, first, because the word "may" in section 800 indicates that the award is discretionary (*Fair v. Hernandez* (1981) 116 Cal.App.3d 868, 876 [172 Cal.Rptr. 379]) and second, because the court also—and we think correctly—concluded that "the case involve[d] . . . novel and complicated issues . . . " and that it was a "bona fide legal dispute of great importance. . . ."

Finally, we are asked by appellants to permit correction of errors contained in the petition on intervention. For the following reasons we agree.

The instant case was initiated by the Director of the Department of Fair Employment and Housing, who filed a complaint

authorized by Government Code section 12960. The Director then issued an accusation based on the complaint, which challenged the club's practices of excluding female employees. The complaint and accusation therein did not name any women as parties or seek backpay on their behalf.

The Commission, while the case was pending before it, received a class action notice, in a *separate* complaint filed against the Club by one Carol Esses, a woman who had been denied employment by the Club. Carol Esses' complaint was mistakenly included in the record of the instant case. When ruling on this case, the Commission also ruled on the Esses complaint and denied an award of backpay.

The portions of the Commission's decision which denied backpay to members of Carol Esses' class action complaint were challenged in the petition in intervention. The Commission agrees that it had no authority to decide issues not raised in a pending case and which concern persons who are not parties.

Under the Administrative Procedure Act, the Commission is only empowered to hold a hearing and issue a decision when an accusation, based upon a complaint, is pending before the agency. (Gov. Code, §§ 11503 and 12967.) Since no accusation was ever filed on the Esses complaint, the commission lacked authority to decide the issues it raises. The case is accordingly remanded to the Commission for rectification. (*Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Appeals Bd.* (1981) 118 Cal.App.3d 720, 727 [173 Cal.Rptr. 582]; *Flaherty v. Board of Retirement* (1961) 198 Cal.App.2d 397, 406 [18 Cal.Rptr. 256].)

That part of the judgment denying the Club attorney's fees is affirmed. In all other respects the judgment is reversed with directions to the trial court to reinstate the Commission's findings. The parties shall bear their own costs.[13]

Racanelli, P. J., and Holmdahl, J., concurred.

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[13] This judgment in no way precludes the Club from attempting to demonstrate that male gender is a BFOQ for particular employment positions.

APPENDIX B

Order Denying Review

After Judgment by the Court of Appeal

1st District, Division 1, No. AO24988

In the Supreme Court of the State of California

In Bank

Bohemian Club,
Appellant,

v.

Fair Employment and Housing Commission et al.,
Appellants.

[Filed Feb. 26, 1987]

Petition for review of appellant Bohemian Club DENIED.

LUCAS
Chief Justice

Appendix C

In the Superior Court of the
State of California,
in and for the County of Sonoma

No. 119026

Bohemian Club,
Petitioner,

vs.

Fair Employment and Housing Commission,
State of California,
Respondent.

Department of Fair Employment
and Housing and Joanne A. Lewis,
Director and Complainant,
Real Parties in Interest
and Intervenors.

STATEMENT OF DECISION

[Filed Sept. 12, 1983]

This matter came on for trial before the Court on December 1 and 3, 1982 on the petition of the Bohemian Club ("petitioner" or "Club"), pursuant to section 1094.5 of the Code of Civil Procedure, for a writ of mandamus commanding the Fair Employment and Housing Commission ("respondent" or "Commission") to set aside its decision and order dated October 14, 1981 in *Department of Fair Employment and Housing v. Bohemian Club* (No. FEP 78-79, A5-1632S and N-15159) and to dismiss the underlying accusation dated May 15, 1980 (as amended on July 30, 1980 and September 30, 1980) ("accusation") of real parties in interest and intervenors Department of Fair Employment and Housing ("Department") and its Director, Joanne A. Lewis ("Lewis").

The Club moved for a stay of the Commission's order, and after briefing and the submission of declarations by the parties, this Court, pursuant to stipulation of the Commission and the Club, ordered that the Commission order be stayed pending the

entry of judgment. Thereafter, the Commission demurred to, and moved to strike the Club's Petition, which demurrer was overruled and motion to strike denied by this Court's ruling dated July 27, 1982. The Commission filed its Return to the Club's Petition on August 3, 1982.

Pursuant to stipulation by the Club and the Commission at hearing before this Court on February 11, 1982, intervenors Department and Lewis filed on March 2, 1982, their Petition in Intervention dated February 2, 1982. The Commission filed on March 4, 1982, its Return to the Petition in Intervention, and the Club filed its Answer to the Petition on March 19, 1982.

Pursuant to an agreed schedule, the parties have submitted written briefs, further declarations and supporting papers in support of their pleadings on the merits. The Court has reviewed the pleadings, has read, considered and reviewed the Administrative Record as well as all of the briefs, declarations and supporting papers, and has heard the arguments presented by counsel for each of the parties on December 1 and December 3, 1982. The Court affirms the evidence rulings of Administrative Law Judge Robert S. Kendall, and except as to the evidence excluded by Judge Kendall, all of the evidence in the Administrative Record and each of the declarations previously submitted by the parties in this proceeding is admitted into evidence.

The Court has exercised its independent judgment on the evidence. The Club has raised at every stage in the proceeding before the Department and the Commission as well as before this Court the Club members' rights of freedom of association and privacy as protected by the United States and California Constitutions. The Commission's order substantially affects the Club members' rights of freedom of association and rights of privacy, and those rights are fundamental vested rights for purposes of review under Code of Civil Procedure § 1094.5. Similarly, the Club's rights with respect to its continued existence and its vital and substantial stake with respect to possible monetary awards or judgments against it also raise fundamental vested rights for purposes of such review.

The Court has carefully considered, reviewed and assessed all of the evidence, including Administrative Law Judge Kendall's January 19, 1981 Proposed Decision and the findings and assessment of evidence made by Judge Kendall. After making its own independent judgment on all of that evidence, and for the reasons set forth below, the decision of this Court is that a peremptory writ of mandamus shall issue commanding the Commission to set aside and vacate its decision and order, and to dismiss the accusation against petitioner Bohemian Club. It is further the decision of this Court that the Petition in Intervention of the Department and Lewis be denied.

First, petitioner is, and always has been, a bona fide private membership Club which is tax-exempt under section 501(c) of the Internal Revenue Code and the laws of California. The Club possesses all the attributes of a bona fide private membership club and, throughout its history, the Club has exercised in good faith those attributes as a distinctly private social association dedicated to and supportive of male fellowship and appreciation of literature, music, drama, and the arts generally. Membership in the Club is open only to men connected professionally with or devoted to the arts, and the Club's membership standards are strictly and honestly enforced. All members are professionally connected with, or devoted to, the arts, and participate in the Club on that basis. The Club has no membership restrictions concerning race, religious creed, color, national origin, ancestry, physical handicap, marital status, citizenship, or sexual orientation. Membership cannot be purchased or sold, and the Club receives no public funds. It is a self-governing orgainzation which vests responsibility for its affairs, including admission to membership, in its Board of Directors. The facilities at which the Club's membership activities take place, the San Francisco City Club and the Bohemian Grove camping area near Monte Rio, California, are owned by the Club and are operated for the exclusive and private use and enjoyment of members and their guests. The Club and its members maintain that private social environment at the City Club and the Grove. The Club is noncommercial, and has resisted attempts to make it commercial or a business club. The Club's facilities are never rented out to the public or otherwise made available for public use. The common associational objec-

tives of the Club's members—the enjoyment of male fellowship and the appreciation and support of, and participation in, the arts—are bona fide and the members' activities are rigorously directed to those objectives.

As such a tax-emempt, bona fide private membership club, petitioner is exempt from coverage under Title VII of the Federal Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e), et seq.). The Federal Civil Rights Act supersedes the provisions of any state laws which are inconsistent with any of the purposes or any of the provisions of the Federal Act (42 U.S.C. § 2000h-4). The clear congressional purpose in exempting bona fide private membership clubs from Title VII of the Federal Civil Rights Act was to protect the associational and privacy rights of the members of bona fide private clubs. The provisions of the Act are manifestly intended to assure those rights to genuinely private noncommercial, bona fide social associations. The Court holds that respondent has proceeded without jurisdiction because respondent's construction of the Fair Employment and Housing Act ("FEHA") as applied to petitioner, a bona fide private membership club whose members have always genuinely exercised their rights of privacy and association directed toward their announced common objectives, is inconsistent with, and superseded by Federal law. The Commission has not, therefore, proceeded in the manner required by law and its order is not supported by its findings.

Second, and in any event, even assuming that respondent Commission has jurisdiction over petitioner, which the Commission has found to be an "employer" within the meaning of the Fair Employment and Housing Act (Gov.Code, § 12926(c)), the Court determines that respondent abused its discretion in concluding that the Club failed to establish that gender is a bona fide occupational qualification under Government Code § 12940 for those employment positions involved with, or which touch and concern, petitioner's all-male associational activities at the City Club and Bohemian Grove. Respondent's conclusions constitute an abuse of discretion in that Commission Findings No. 24 (last sentence), 25 (last sentence), 36 (last sentence), 37, 40 (last two sentences), 41, 42, 43, 44 (the first sentence and the second

clause of the second sentence), 45, 46, 47, 48, 49, 50 and 51, which findings of fact were made by the Commission to support the conclusions of law reached by the Commission in its decision and order, are neither supported by the weight of evidence nor by any substantial evidence. The Court further determines that, to the extent certain of respondent's other findings are supported by the evidence and are consistent with the facts found herein, respondent has abused its discretion in that its own findings do not support its decision or order.

Third, and in any event, based upon its independent judgment, and the facts set forth herein, this Court finds that in the positions where the Club has employed only men, those employees are present during and integrally involved with the all-male associational activities. The employment of men in those positions at the City Club and the Bohemian Grove is essential to preserve the members' rights of privacy, the integrity of the Club's objectives, its bona fide associational activities dedicated to and supportive of the arts, and the all-male atmosphere which is indispensable to, and the essence of those activities. The Commission's contrary conclusions are neither supported by the weight of the evidence or any substantial evidence, nor by such of the Commissions' own findings as have support in the evidence.

The Court further determines that the Commission's conclusion that a bona fide occupational qualification has not been established erroneously relies upon regulations and judicial decisions concerning commercial or business employers. The Commission's conclusion is not supported by the weight of the evidence, or any substantial evidence, that the Club is or should be treated as a commercial or business institution or association, or that the Club members engage in commercial, trade or business activities at the Club or its functions. The Commission's conclusions are not supported by its own findings. The Court finds that the bona fide occupational qualification provision (Gov.Code, § 12940) applies to the policy and practices of the Club as a private noncommercial, bona fide social association in employing men in those positions involved with the all-male associational activities at the Club. The Commission has not

proceeded in the manner required by law in its contrary conclusion in its order and decision.

For the foregoing reasons, and based upon the facts set forth herein, the Court holds that male gender is a bona fide occupational qualification for all positions at petitioner's Bohemian Grove and all those positions at respondent's City Club which are involved with and touch and concern the members' traditional all-male associational activities. On the basis of its independent judgment, the Court concludes that this narrow limited bona fide occupational qualification applies to petitioner's employment policy and practices and they are not in violation of the FEHA.

Fourth, and in any event, the Court further determines that, to the extent they are not inconsistent with the facts stated herein, all of the findings of Administrative Law Judge Kendall are supported by the weight of the evidence.

In accordance with long-established principles of decision making, the Court declines to decide if the Constitutions of the United States and California preclude any governmental intrusion under the Fair Employment and Housing Act into respondent's employment decisions as a violation of the Club members' rights of freedom of association and privacy. Intervenors Department and Lewis have also petitioned the Court to issue a peremptory writ ordering the Commission to set aside its Findings of Fact 6, 8 and 9, and its decision and order insofar as the Commission recognized the chilling effect of its decision upon the Club's constitutional freedoms of association and privacy, and determined that backpay shall not be awarded to a complainant and other women similarly situated. The Court denies the intervenors' petition because of its rulings on the petition of the Club and because it has declined to decide if any intrusion by the State under the Fair Employment and Housing Act violates the Club's and its members' constitutional freedoms of association and privacy.

In addition to the facts already stated, the Court finds as follows:

1. Intervenor Department is an administrative agency of the State of California empowered to issue accusations under the

FEHA, but not deriving its adjudicatory power from the California Constitution.

2. On May 18, 1979, Intervenor Joanne A. Lewis, in her official capacity as Director of the Department, filed a complaint with the Department alleging that the Club had violated the FEHA within the preceding year by discriminating against women in filling positions of office clerk-typist at the Grove.

3. On February 25, 1980, the Director amended her complaint to allege that the Club had pursued a practice and pattern of discrimination against females in hiring, transfers, promotional opportunities and recruitment at the San Francisco City Club and the Bohemian Grove.

4. On May 15, 1980, the Department issued an Accusation against the Club and on June 2, 1980, the Club served a Notice of Defense and Objections to the Accusation.

5. The Department filed an Amended Accusation and a Second Amended Accusation on July 30, 1980, and September 30, 1980, respectively.

6. Petitioner placed a job order for an office clerk-typist with the California Employment Development Department on August 4, 1978. The Club specified that only male applicants were acceptable for the position and requested that only men be referred to it. Qualified women were available for referral at that time. But for the prerequisite established by the Club these persons would have been available to apply for the position.

7. The Club is a bona fide private social association of men founded in San Francisco in 1872. The Club has always been organized as a nonprofit corporation and presently is a nonprofit mutual benefit corporation organized and acting under Part 3, Division 2, Title 1, California Corporations Code.

8. The Club is a tax-exempt organization under the laws of the State of California and the United States. The Club's Constitution and By-Laws provide that membership in the Club is open only to men connected professionally with or devoted to the arts.

9. All of the Club's membership standards and rules are strictly enforced. All members must be connected professionally with or devoted to the arts, and participate in the Club's associational activities on that basis. The Club receives no public funds. The Club has never been convicted of any crime or wrongdoing. The Club has approximately 2,000 members.

10. Petitioner is a private, noncommercial social association. It rigorously maintains its noncommercial status. It is not a "business" commercial luncheon club. Memberships cannot be purchased or sold, and are not based upon business or commercial success, wealth or status.

11. Petitioner prevents commercial exploitation of Club activities and guards the privacy of its members. All of the Club proceedings or happenings are maintained privately. Neither members nor guests exploit the Club activities for commercial purposes.

12. Petitioner is a self-governing private organization which vests responsibility for its affairs in its Board of Directors elected by the membership. All of the Club's policies and the implementing committee actions are devoted to its associational objectives of appreciation of literature, music, drama, and the arts generally.

13. The Board of Directors establishes petitioner's employee personnel policies, which are implemented by the Club's general manager and staff. Those policies are in accord with and directed to the accomplishment of the Club's associational objectives.

14. The Club members' associational activities take place at two locations: the City Club at 624 Taylor Street, San Francisco, California, and the Grove, a large rustic camping area near Monte Rio, California. Both the City Club and the Grove are owned and privately maintained by petitioner.

15. The City Club is a five-story building which contains sleeping accommodations for Club members' use; several dining rooms (Main Dining Room, Anza Room, Balboa Room, Cabrillo Room, Bohemian Room, Board Room, Grove Room, Red Room and Owl Room); several other meeting, association and activity rooms (Music Room, Green Room, Domino Room, Main Card

Room and Main Lounge); a theatre (Jinks Theatre); a bar and stage (Cartoon Room); a library; an archives; a barbershop; and an art gallery.

16. The Grove comprises more than 2,500 acres and includes a small well-defined living and camping area containing about 125 group living areas ("camps"), various buildings, shelters and other associational activity areas, including a large open-air dining area, various other eating areas, several bars, stages and theatres. Each camp is a voluntary fraternal smaller group of members living and associating together.

17. The purposes of the Club are the enjoyment of male fellowship and the appreciation of, and participation in the arts. Participation is an obligation of membership. There is extensive participation in Club associational activities by all members.

18. Petitioner's associational activities are based upon and follow traditions over 100 years old. In general, the Club's main associational activities at the Grove are two all-male retreats (the three-day Spring Jinks weekend in June and the seventeen-day Midsummer Encampment in July), during which members and guests live at the Grove and participate in artistic, musical and theatrical activities. During the Spring Jinks and the Midsummer Encampment, Club associational activities proceed on virtually a 24-hour-a-day basis throughout the Grove. There are many scheduled as well as informal activities: concerts, theatrical and musical productions, oratorical presentations, Lakeside talks, readings, art appreciation discussions, singing, and many other similar activities. In addition to the major theatrical and musical productions (which may take over two years in the process of production), there is a regular artistic production every evening, and the annual retreats are characterized by an extensive variety of informal musical entertainment, singing and dancing performed extemporaneously by members and their guests throughout the day and night at individual camps, at various entertainment areas, and along the walks, paths and all of the nearby areas. Many of these informal activities take place during mealtimes and are associated with camaraderie, refreshments and conversation at the large common dining area, in the Grill (a restaurant, bar and stage) and at the individual camps. Club

members and guests go from one camp to another to participate in the ongoing associational activities.

19. Petitioner's primary all-male associational activities at the City Club take place in connection with artistic, musical, literary and theatrical presentations. There are at least thirty-six weekly Thursday evening theatrical and musical productions, weekly musical entertainment on Tuesday evenings, concerts and talks, readings by authors, poets and dramatists, classes in photography, art and other subjects and many other formal and informal artistic, theatrical and musical events.

20. To accommodate the Club activities at the Grove and at the City Club, members rehearse, perform and associate together in all areas in the Grove and at the City Club in the Cartoon Room, the Jinks Theatre, the Main Dining room, various rehearsal rooms, the Art Gallery, and in other available rooms.

21. The activities restricted to members and their male guests are the Spring Jinks and the Midsummer Encampment at the Grove and all of the Club's regular all-male associational activities taking place in the Main Dining Room, the Cartoon Room, the other activity rooms and the rehearsal rooms of the City Club.

22. Petitioner's facilities at the Grove and the City Club are private and for the exclusive use of members and their guests. The Club takes all measures necessary to ensure privacy for members and their guests. Nonmembers and uninvited persons are not permitted and, if they enter, are not allowed to remain. Access roads at the Grove leading into the living and camping area are fenced, the entry roads have locked gates, signs are posted along the perimeter to indentify the area as private property and security guards patrol the Grove to prevent uninvited persons from entering. Privacy and seclusion are emphasized to assure the special environment of retreat and sanctuary.

23. During the Midsummer Encampment and Spring Jinks, the Grove becomes the home of up to 2,500 Bohemians and their male guests. These events are retreats by members and guests away from the outside world in a natural, rustic setting to create an ambience and intimacy where men join together to celebrate the arts.

24. Grove participants live together in approximately 125 camps, consisting of cabins, tents, tepees and open sleeping porches; some are assembled for the retreats and taken down afterwards. The camps are rustic and, in many camps, toilet and shower facilities (some of which are completely open and unshielded, or only partially shielded from view) are separate from the sleeping quarters. Some of the toilet facilities have stalls with doors and some do not. Men urinate without the benefit of even the existing rudimentary toilet facilities. Members and guests at times walk about the Grove in various states of dress and undress: from the sleeping quarters in one camp to the toilet and shower facilities which may be removed some distance away; from the camps to the swimming area; and from camp to camp.

25. Members and guests who attend the Grove eat in an open-air, unenclosed dining area from which they view and participate in dramatic, musical and other such events that take place before, during and after the dining hours at the dining site itself. Food service preparation and food service employees, all male, work in and around the dining area and adjacent areas before, during and after the hours when food is served. There are informal and extemporaneous social activities throughout the rest of the Grove, in the camps and other areas where male employees work, serve drinks and refreshments, and assist in connection with the associational activities.

26. At the City Club, petitioner employs approximately 90 individuals, both male and female, in managerial, clerical, craft, food preparation and service, cleaning and personal service positions. This staff is supplemented, as necessary, by temporary employees hired to work at Club functions.

27. At the Grove, petitioner maintains a small year-round staff of around ten craft workers, office workers and laborers, all male, who have substantial expertise and are knowledgeable and experienced in various special fields such as plumbing, carpentry, electrical work and fire protection. They are hired because of their individual proficiencies and ability to work and to be available during the retreats. These employees, as a condition of employment, must be available full-time to supervise and work with the special, temporary work force during the retreats. The members

of this permanent staff supervise this temporary work force of approximately 250 men who are employed solely during the Spring Jinks and Midsummer Encampment. These employees eat within the Grove and most of them live within the Grove when they work there.

28. Grove employees are regularly required to enter individual camps and adjacent areas as well as travel all the roads and paths to and around the Grove's common areas during day and night in the performance of their duties, such as delivering baggage, mail, messages and supplies from a central, in-camp commissary to the individual camps and to the central Grove buildings; gathering and delivering supplies for camps throughout the Grove; performing maintenance work involving repairs of plumbing, wiring and carpentry; moving furniture and pianos; and serving food and drinks at the dining areas and in the camps.

29. During the Midsummer Encampment and Spring Jinks, Club activities proceed continuously throughout the Grove. At the City Club associational activities take place in the Main Dining Room, the other activity rooms, the Cartoon Room and the rehearsal rooms. These associational activities are generally scheduled to coincide with or follow immediately before or after meals and refreshments. Employees are present during all of the activities at the Grove and most of the activities at the City Club, working closely with members in connection with the activities: at the Grove, performing various duties in the Grove common areas and at the camps, coming and going between their own living quarters at the campground and the entrance to the Grove, to other Grove areas and to individual camps; at the City Club, performing various duties and coming and going from different rooms; participating in the badinage and camaraderie during the associational activities in the dining areas and the other common areas at the Grove and City Club, and in the Grove camps; and attending Club theatrical and artistic events, productions and other associational activities when their work schedules permit. In the course of performing their duties at the Grove and in various rooms of the City Club when all-male associational activities take place, employees are necessarily involved with, integral to and present during those activities.

30. For many years it has been, and is, the Club's policy to employ only males at the Grove and in all those positions at the City Club which require the employee to work during and in connection with the regular, all-male, associational activities in the Main Dining Room, the other dining rooms, the activity rooms, the Cartoon Room, the rehearsal rooms and theatre. That policy is not contrived to evade any law; it is bona fide and has been established and maintained to implement and protect the Club members' privacy and associational interests.

31. Petitioner employs women in positions which do not require either presence at the Grove or involvement with or participation in or presence during regular associational activities at the City Club. In accordance with this policy, petitioner regularly employs women at the City Club in its print shop, in accounting and administrative positions in its business office, for cleaning and care of the rooms for sleeping accommodations, as assistant chef and as food servers in the private rooms for members' private parties but not in any of the common rooms when associational activities are taking place. One woman, Lily Lum, works for two hours serving breadstuffs during lunch in the City Club Main Dining Room. She was hired to work during World War II because of the nonavailability of male help. She remained an employee to perform this two-hour duty because of her loyalty and the high regard in which she is held by the members. Miss Lum is not present during, nor is she integrally involved in any of the Club's all-male associational activities.

32. Women, whether guests of members or employees, are not and have never been allowed to be present during the Club's all-male associational activities at the Grove or City Club.

33. The introduction of women employees at the Grove and in positions at the City Club now held by men would drastically and fundamentally change the nature and purpose of the Club and would profoundly affect the male associational activities, values, camaraderie and fellowship of the Club and its members. If women were present during the all-male associational activities, the behavior, involvement and participation by members with respect to those activities would be altered, and a completely different social situation would be created with significantly

changed social dynamics. The presence of women during these activities would create a different kind of social association and environment than that which the members have in good faith determined for the Club.

34. The introduction of women employees at the Grove and in positions at the City Club now held by men would result in some changes which would be subtle and some changes which would be dramatic in connection with the all-male associational activities: the environment and ambience during mealtimes, Afterglows, Lakeside talks, camp entertainments and campfires at the Grove and during such associational activities conducted both at the Grove and the City Club, would be different if women were present; Club members and guests would be inhibited in taking women's roles and performing generally in theatricals, musicals, serious drama, skits and other artistic productions if women were present; members now comfortably portray female as well as male roles because they are within the private social atmosphere reflecting the Club's spirit and traditional objectives; attendance and member participation in such associational activities would decrease if women were present; and other changes would further significantly alter the integrity of the Club's objectives if women were present at the Grove or during such activities at the City Club.

35. The Grove is not physically arranged to accommodate segregated living facilities ensuring privacy for women employees. Because of the frequency and the pervasive nature of the all-male associational activities at the Club, employees are present during, integrally involved with, and, in some instances, participate in those activities. The performance of duties and work assignments of the male employees could not be rescheduled, altered, or reorganized to avoid impact and effect upon the Club and members' associational activities and privacy as reflected in the facts stated herein.

36. The introduction of women, whether as guests or employees, would significantly interfere with the privacy of the members and would result in radical change of the nature and ambience of the private associational activities at the Grove during the Spring

Jinks and Midsummer Encampment and at the City Club during its regular, all-male associational activities.

37. The Commission, the Department and Lewis have opposed petitioner on various grounds which are not supported by the evidence, including assertions that the Club is a "scoff law" whose employment practices are pretexts, and based on claims that are unbelievable, nonsensical, and reflect incredible speculation. The Department's and Lewis' action before filing its accusation and in prosecuting the Club before the Commission reflects arbitrary and capricious conduct designed to unfairly and prejudicially bring enforcement proceedings against the Club because of its membership. The Commission has similarly engaged in arbitrary and capricious conduct by its prejudgment and bias against the Club, its acquiescence and participation in the procedures and actions of the Department and Lewis, and its announced motivation and bias against clubs which discriminate by having only men as members.

In addition to the conclusions already stated, and based upon the facts herein, the Court concludes that petitioner is entitled to its attorneys' fees because the accusation by intervenors, the Department and Lewis, their prosecution of the Club, and the Commission's decision and order were inextricably related and connected to the result of arbitrary and capricious action and conduct by the Commission, the Department and Lewis in her official capacity.

Therefore, it is *ORDERED* that a peremptory writ of mandamus shall issue commanding respondent Commission to set aside its decision and order dated October 14, 1981, and to dismiss the accusation as twice amended against petitioner. Petitioner shall recover its costs according to cost bill. Petitioner may claim reasonable attorneys' fees in its cost bill, the propriety of which may be addressed under appropriate motion to tax.

Dated: Sept. 12, 1983.

/s/ _____
Kenneth M. Eymann,
Judge of the Superior Court

Appendix D

Before the Fair Employment and Housing Commission
of the State of California

Case No. FEP78-79
A5-1632s
N-15159

In the Matter of the Accusation of the
Department of Fair Employment and Housing

vs

Bohemian Club,

Respondent.

Joanne A. Lewis, Director,

Complainant.

Decision

[Filed Oct. 14, 1981]

This matter was heard on an Accusation, Amended Accusation, and Second Amended Accusation before Robert S. Kendall, Administrative Law Judge, State of California, Office of Administrative Hearings, on October 16, 17, and 21, 1980, at San Francisco, California.

The Department of Fair Employment and Housing[1] was represented by Robert Barnes, Staff Counsel.

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[1] Pursuant to the Governor's Reorganization Plan No. 1, effective January 20, 1980, the Division of Fair Employment Practices and the Fair Employment Practice Commission, within the Department of Industrial Relations, were abolished and replaced by the Department of Fair Employment and Housing and the Fair Employment and Housing Commission within the State and Consumer Services Agency, which entities succeeded to the functions of the former Division and Commission. As part of this reorganization, the California Fair Employment Practice Act (former Lab. Code, § 1410 et seq.) and the Rumford Fair Housing Act (former Health and Saf. Code, § 35710 et seq.) were, effective January 1, 1981, included in the Fair Employment and Hous-

Respondent Bohemian Club was represented by William I. Edlund, Joseph R. Tiffany, and Michael J. Boylan, Attorneys at Law.

The Commission received Judge Kendall's proposed decision on January 19, 1981. The Department of Fair Employment and Housing submitted a Petition for Opportunity for Further Argument on February 6, 1981, and Respondent timely filed an Opposition to such Petition on March 24, 1981. Pursuant to Government Code section 11517, subdivision (c), we issued a Notice of Opportunity for Further Argument on April 27, 1981, and the parties' briefs were thereafter timely received.

In view of several issues raised by Respondent in its Response, on July 2, 1981, the Commission issued a Resolution and Notice of Opportunity to Petition for Further Evidence or Argument. On July 17, 1981, Respondent timely filed a Response to said Notice in which it declined to petition for such opportunity. The case therefore stood submitted as of July 17, 1981.

After exhaustive consideration of the entire record in this case, the Commission makes the following Findings of Fact and Determination of Issues.

FINDINGS OF FACT

1. Complainant Joanne A. Lewis, Director of the Department of Fair Employment and Housing ("DFEH"), made the allegations in the Accusation, the first amendment thereto, and the Second Amended Accusation in her official capacity and not otherwise.

2. The DFEH is an administrative agency of the State of California empowered to issue accusations under the Fair Employment and Housing Act ("Act") (Gov. Code, § 12900 et seq.). The DFEH has complied with all procedural requirements of the Act.

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ing Act and codified in the California Government Code at section 12900 et seq.

3. On May 18, 1979, the Director, acting in her official capacity, filed with the DFEH a verified written complaint alleging that Respondent Bohemian Club ("Respondent" or "Club") had violated the Act within the preceding year by discriminating against women in filling positions of office clerk-typist at the Bohemian Grove ("Grove") in Monte Rio, California.

4. On February 25, 1980, the Director amended her complaint to allege that Respondent had pursued a practice and pattern of discrimination against females in hiring, transfers, promotional opportunities, and recruitment at both its City Club in San Francisco and the Grove in Monte Rio.

5. On May 15, 1980, the DFEH issued an Accusation against Respondent and on June 2, 1980, Respondent served a Notice of Defense and Objections to the Accusation.

6. On June 4, 1980, Carol Linda Esses filed with the DFEH a verified written complaint on behalf of herself and all others similarly situated alleging that Respondent had engaged in unlawful practices under the Act.

7. The DFEH filed an Amended Accusation and a Second Amended Accusation on July 30, 1980, and September 30, 1980, respectively.

8. On May 12, 1981, the DFEH notified the Commission that this litigation would proceed as a class action for all purposes.

9. The class of which Ms. Esses is a member is composed of all females who between January 1, 1978, and the present were members of Hotel & Restaurant Employees Union, Local 2 ("Union" or "Local 2"), and who were refused employment by Respondent on account of their sex as employees at the Grove, as permanent employees of Respondent's City Club, as temporary employees in the City Club's Main Dining Room, or who would have sought such employment but for Respondent's reputation for discrimination on account of sex.

10. Respondent Bohemian Club is an employer of five or more persons within the meaning of Section 12926, subdivision (c) of the California Government Code.

11. It was established that Respondent placed a job order for an office clerk-typist with the California Employment Development Department on August 4, 1978. At that time, Respondent specified that only male applicants were acceptable for the position and requested that only men be referred to it.

12. Qualified women were available for referral at that time. But for the prerequisite established by Respondent, these persons would have been available to apply for the position.

13. Respondent is a bona fide private social association of men founded in San Francisco in 1872. It has always been organized as a non-profit corporation and presently is a non-profit mutual benefit corporation organized and acting under Part 8, Division 2, Title 1, California Corporations Code. The Club is a tax-exempt organization under the laws of the State of California and the United States and receives no public funds.

14. Respondent is a self-governing organization which vests responsibility for the oversight of its affairs in an eleven-member Board of Directors elected by the membership. The policies of the Board of Directors are implemented by various committees, including the Jinks Committee (supervision of Club entertainment), the Art Committee (supervision of Club artistic exhibitions and care of the Club's are collection), the Library Committee (care and supervision of the library), the Grove Committee (care and supervision of the Grove), and the Membership Committee (selection of members).

15. Respondent's Constitution and By-Laws provide that membership in the Club is open only to men connected professionally with or devoted to the arts. The Club has approximately 2,000 members in various membership categories, including categories of membership for non-Bay Area residents and persons professionally connected with the arts or sciences. Memberships are not based upon business achievements, and memberships cannot be purchased or sold. Potential members are individually sponsored by present members, and unsolicited applications for membership are not received. The Club's membership standards and rules are strictly enforced.

16. The purpose of the Club is participation in and appreciation of the arts and male fellowship. Participation is an obligation of membership—every member is required to "Carry a Spear in Bohemia"—and a participation subcommittee is responsible for encouraging wide participation by members in Club activities. The Club's By-Laws provide that each member must accept "the obligation to render to the Club, when called upon, such assistance with the objects, purposes and customs of the Club as lies within his abilities" and members are subject to disciplinary action for failure to do so. Members are not shy or reluctant to participate in the Club's associational activities and are willing to meet their membership obligations. Indeed, there is extensive participation in associational activities by all members.

17. While Respondent restricts membership to males only, no evidence was introduced at hearing to suggest that the Club has membership restrictions concerning members' (or their guests') race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, citizenship, or sexual orientation.

18. Respondent is a non-commercial association, and its rules and traditions prohibit members and guests from engaging in commercial, trade or business activities while at the Club or its functions. The Club prevents commercial exploitation of its activities by prohibiting reporters, requests for autographs or souvenirs, and the use of tape recorders; by restricting the use of still and motion picture cameras; by forbidding the publication of Club proceedings or happenings (including plays, songs, talks and papers); and by prohibiting references by members or guests to the Club activities for commercial purposes. The non-commercial nature of the Club is reflected in its motto "Weaving spiders come not here" and in its prohibition against "shop talk."

19. Respondent's members' associational activities are carried out at two locations: a City Club at 624 Taylor Street, San Francisco, California, and a large camping area near Monte Rio, California, known as the Grove. Both the City Club and the Grove are owned by Respondent, are for the exclusive enjoyment of members and their guests, and are never available for public use.

20. The City Club is a five-story building which contains sleeping accommodations for Club members' use on either a permanent or a short-term basis; several dining rooms (Main Dining Room, Anza Room, Balboa Room, Cabrillo Room, Bohemian Room, Board Room, Grove Room, Red Room and Owl Room); several other meeting, association and activity rooms (Music Room, Green Room, Domino Room, Main Card Room, and Main Lounge); a theatre (Jinks Theatre); a bar and stage (Cartoon Room); a library; an archives; a barbershop; and an art gallery.

21. The Grove is over 2,500 acres and, within that area, there is a small well-defined living and camping area comprising about 125 group living areas, various buildings, shelters, and other associational activity areas, including a large open-air dining area, various other eating areas, several bars, stages, and theatres.

22. Each group living area, called a camp, is a voluntary fraternal group of members within the Club itself. Camps consist of cabins, tents, teepees, and open sleeping porches; some are assembled for the retreats and taken down afterwards. Each camp has a small platform which is used as a performing area for camp associational activities conducted for camp members and their guests. Other Club members and guests at the Grove are habitually invited to a specific camp to participate in entertainment, conversation, luncheon, etc.

23. In many camps the toilet and shower facilities are separate from the sleeping quarters. Although members and their guests are usually dressed in outdoor clothing, they will be in various states of dress and undress when walking to and from the removed facilities, and will occasionally forego using the facilities in favor of urinating elsewhere.

24. Some toilet and shower facilities are unshielded or only partially shielded from view. These facilities could be modified to insure privacy at de minimis cost to Respondent.

25. Bathroom facilities reserved for use by Grove employees are in enclosed buildings and could be used by either sex. If needed, walls could be built and existing employee housing could

be otherwise altered to accommodate female employees at de minimis cost to Respondent.

26. Respondent takes all measures necessary to insure privacy for members and their guests at the Grove and the City Club. Radios, phonographs, television sets and recording equipment are prohibited at the Grove and photography is controlled. Nonmembers and uninvited persons are not permitted and, if they enter, are not allowed to remain. At the City Club, nonmembers must have a visitor card or be accompanied by a member. At the Grove, access roads leading into the living and camping area are fenced, the entry roads have locked gates, and signs are posted along the perimeter to identify the area as private property. Fourteen security guards patrol the Grove at all times during the summer events to prevent uninvited persons from entering. All members and guests must be identified and check in upon arrival at the main gate where all cars must be unloaded and parked permanently under guard.

27. Respondent's activities are based upon and follow traditions over 100 years old. Respondent's associational activities at the Grove are two retreats (the three-day Spring Jinks weekend in June and the seventeen-day Midsummer Encampment in July), during which members and their male guests live at the Grove and participate in a wide variety of artistic, musical and theatrical activities.

28. During the Spring Jinks and the Midsummer Encampment, Club associational activities proceed on virtually a 24-hour-a-day basis throughout the Grove. There are many scheduled activities: concerts, theatrical and musical productions (in which all parts, male and female, are played by Club members), oratorical presentations, Lakeside talks (talks by members and guests), hikes, and sporting activities.

29. At the Midsummer Encampment, three major productions are presented, one on each of the three weekends. On the first weekend, the Cremation of Care, an elaborate traditional ceremony symbolizing the members' retreat from the everyday working commercial world, takes place at the Lake, centering on the Owl Shrine, an outdoor stage activity area. On the second

weekend, the Club presents the Low Jinks, an original musical comedy, at Field Circle, an outdoor stage. On the final weekend, the Grove play, an original serious musical drama, is presented on the Grove Stage, another outdoor amphitheatre. At the Spring Jinks, two variety shows comprise the major scheduled theatrical presentations.

30. In addition to these productions (which can take over two years in the process of production), there is a regular artistic production every evening, and the annual retreats are characterized by an extensive variety of informal musical entertainment, including singing and dancing performed extemporaneously by members and their guests throughout the day and night at individual camps, at various entertainment areas, and along the walks and paths of the Grove. Many of these informal activities take place during mealtimes and are associated with camaraderie, refreshments and conversation at the large common dining area, in the Grill (a restaurant, bar, and stage), and at the individual camps.

31. During the Midsummer Encampment and Spring Jinks, the Grove becomes the home of up to 2,500 Bohemians and their guests. Many non-Bay Area members are able to participate in Club activities only during these events. Historically, members and guests have considered these events retreats from the outside world, and the Grove has been seen as a natural, rustic setting in which to enjoy male fellowship and celebrate the arts.

32. Respondent's associational activities at the City Club take place in connection with artistic, musical, literary and theatrical presentations. The major activities at the City Club include at least thirty-six weekly Thursday evening theatrical and musical productions, weekly musical entertainment on Tuesday evenings, concerts and talks, monthly evening readings by authors, poets and dramatists, classes in photography, art and other subjects on Wednesday evenings, and many other formal and informal artistic, theatrical and musical events.

33. The Thursday night productions are scheduled for the third Thursday in September through the first Thursday in May. Rehearsals and performances take place in the Main Dining

Room and are scheduled to immediately precede and follow dinner, respectively. Employees are required to leave the Dining Room prior to the performances. Rehearsals for the Grove plays take place from May through July in the Main Dining Room and in all available rooms as needed, and are likewise scheduled for before and after the dinner hour.

34. The Board of Directors establishes Respondent's employee personnel policies, which are implemented by Respondent's general manager and staff. No evidence was received, wherefrom it can be found, that Respondent has either express or tacit employee hiring policies based on a potential employee's race, religious creed, color, age, or sexual orientation. For many years it has been, and is, Respondent's policy to employ only males in those positions which allegedly require the employee to work during its regular, all-male, associational activities. Respondent's intentional discriminatory hiring policy systematically excludes females from all temporary and permanent jobs at the Grove, nearly all permanent jobs in food service functions at the City Club, and most temporary and other permanent jobs at the City Club. As a result of limiting its job offerings, Respondent has denied employment and promotional and transfer opportunities to qualified females because of their sex.

35. Of 74 current permanent City Club employees, 11 are women. The jobs presently performed by women include those of maid (3 women clean the members' sleeping/living area), telephone operator (1), accounting clerk (2), caterer (1), cook (1), secretary (1), manicurist (1), and busperson (Lily Lum, who serves breadstuffs during lunch in the Main Dining Room). The male staff (63) performs all other tasks. This permanent staff is supplemented, as necessary, by temporary employees hired to work at Club functions. Women are employed as foodservers in the private rooms for members' private parties (members may have women as their guests in the various private dining rooms) but not in the "associational" rooms. With the exception of Lily Lum (and several women who, like Ms. Lum, were hired during World War II but who, unlike Ms. Lum subsequently left the Club's employ), no woman has ever been hired as a permanent foodserver.

36. At the Grove Respondent maintains a small year-round staff of around ten craft workers, office workers, and laborers, all male, who are knowledgeable and experienced in various special fields such as plumbing, carpentry, electrical work, and fire protection, and who are hired because of their individual proficiencies. These employees, as a condition of employment, must be available full time to supervise and work with special, temporary work crews in the Grove during the retreats. Under the direction of the Club Manager and Maitre d' (who take up residence in the Grove during the retreats) the members of this permanent staff supervise the temporary work force of approximately 250 male-only laborers, guards, firefighters, parking attendants, office helpers, and culinary employees who are employed solely during the Spring Jinks and Midsummer Encampment. These employees eat within the Grove and, although not required to do so, nearly all of them live within the Grove during their period of employment. Although the Club's current practice is to require the permanent City Club employees to work at the Grove during its summer retreats, the Club failed to establish that this practice is necessary for the Club to be able to conduct these events.

37. Respondent fills its positions through accepting referrals from Local 2 and the Employment Development Department, hiring men "off the street," and, in the case of the Grove, recruiting men from the area. The evidence suggests that there exists an understanding between Local 2 and the Club that the former is to refer only males unless otherwise specified (for mixed-gender private parties at the City Club). In those instances when women have been referred without request, they have been paid union wages (the Club prohibits gratuities) but have not been permitted to work. The evidence suggested that no male referred by the Union has ever been refused employment at the City Club.

38. It was established that for the years 1978, 1979, and 1980, Respondent has no documents in its possession, custody or control which either measure applicant flow for its employment positions or record employee transfer and promotion requests.

39. Respondent does not require applications for its cook, bartender and foodserver positions at the City Club; it does require applications for most other positions. The Club first required applications for Grove employment in 1980. Prior to that time, the Club's policy was to employ all males referred by the Union unless the Club had previously advised the Union in writing to not refer a particular person.

40. It was established that between May 18, 1978, and May, 1980, Respondent included in its employment application forms inquiries concerning applicants' sex, marital status and citizenship. Respondent's current forms include inquiries concerning applicants' citizenship, physical condition, and whether applicants have received Worker's Compensation payments or have ever worked at the Bohemian Grove. Nothing on the forms suggests that the Club attempts to or can ascertain whether an applicant could satisfactorily participate in the Club's associational activities or "interrelate" with Club members and guests. It is evident that the Club does not attempt to screen potential employees for any qualifications other than their ability to perform the mechanical aspects of the particular job.

41. It was established that employees are prohibited from fraternizing with members and their guests; that they participate in Club associational activities only on rare occasions; that they are often excluded from associational activities; and that some employees interrelate with members and some do not. Neither the ability to satisfactorily participate, nor the ability to interrelate with members beyond that required in any employment context, nor male gender constitutes an accurate description of the qualifications relevant to perform the duties of the positions in issue. It is found that these traits in employees are not necessary to preserve the essence of the Club.

42. It is found that there is no factual basis to believe that the employment of females in those positions from which they are presently excluded would add a measurable element of sexuality beyond that which currently exists in the Club, nor that this element would stifle fruition of Club goals. Sexuality currently exists in the Club and the Club has not evidenced any consequent difficulties.

43. It is found that there is no factual basis to believe that the employment of females in those positions from which they are presently excluded would inhibit the Club members' participation in Club associational activities. Members' testimony at hearing to that effect constitutes unfounded speculation and is devoid of a factual basis.

44. It is found that the members' speculation at hearing as to what other members might speculate would be the impact of the proposed female employment was insufficient to establish that all or substantially all members object to such employment. The evidence established that the members have never been polled on the issue and that at least one member has affirmatively indicated his acceptance of female foodservers.

45. It was established that the only factual experience the Club has had in employing women in the associational areas is its prior employment of females during World War II, and its current employment of Lily Lum. It was also established that Ms. Lum works in the Main Dining Room during Club associational activities and that members have neither complained about her presence nor restricted their participation on account thereof. It was further established that the sole female cook employed in the City Club's kitchen is in a position to view costumed members as they walk through the corridor linking the Grove Room to the Main Dining Room, and no evidence was presented to suggest that members are deterred from participating in associational activities on account thereof.

46. It is found that the refusal of members to fully participate in Club associational activities would contravene the purpose, Constitution, By-Laws, and traditions of the Club (as stated in Findings 15 and 16, ante) and would, for that reason, not occur were the Club to employ more women in associational areas. It is further found that this fact vitiates the credibility of the Club members' testimony on this issue.

47. The Club failed to establish factual bases for its contentions that the dynamics which give fruition to the Club's associational interests necessarily require the exclusion of female employees at Club associational activities and that the introduc-

tion of female employees in positions from which they are presently excluded would radically alter the nature of the Club or profoundly affect the associational activities, camaraderie, and fellowship of Club members. It is found that the Club's prior and current experience of employing women in those positions which the Club has traditionally restricted to male employees did not and does not affect the Club's ability to exist as an associational enclave for men. It is further found that female employees would extend as much loyalty and exhibit as much discretion as do current male employees.

48. The Club failed to establish that women, or substantially all women, are not possessed of those undefined and unexplained employee qualities which the Club contends are necessary for its continued success. The Club further failed to establish that it is impracticable to test or screen employee applicants for those qualities, whatever they might be.

49. The Club failed to establish that it has attempted to accommodate female employees at the Grove. Although a number of Grove employees are required under current practice to enter individual camps and adjacent areas in the performance of a wide variety of duties—delivering baggage, mail, messages and supplies from a central, in-camp commissary around the Grove to the individual camps; gathering and delivering wood supplies for camps throughout the Grove; performing maintenance work involving repairs of plumbing, wiring and carpentry; moving furniture and pianos; serving food and drinks at the regular dining areas and, for extra wages, at camp parties; driving buses (which are the only transportation for members and guests inside the Grove); etc.—it was not established that these duties cannot be assigned in such a way so as to minimize the number of Grove positions which require employee presence at associational activities. It was not established that such specialized assignments would require the employment of additional personnel. Furthermore, it was not established that employees who work in those positions which are already specialized, such as cooks, cannot be isolated from the Club's associational activities. The evidence did establish that the employment of women as security guards and

adminstrators would not influence members' participation in the Grove's associational activities.

50. Respondent failed to establish that it cannot arrange scheduling at the City Club so as to exclude employees from its associational activities.

51. Respondent failed to establish that the maintenance of employee positions is necessary for successful operation of the Club.

DETERMINATION OF ISSUES

JURISDICTIONAL ISSUE

Respondent contends that the Commission lacks jurisdiction of this matter because the Club is not an "employer" within the meaning of Government Code section 12926, subdivision (c), which reads as follows:

> " 'Employer,' except as hereinafter provided, includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities.
>
> " 'Employer' does not include a religious association or corporation not organized for private profit."

Respondent specifically argues that there exists an ambiguity in the statutory definition as it currently reads and that, properly read, this section excludes all forms of corporations not organized for private profit.

The rules of statutory construction dictate an act should be read as punctuated. (*Paris v. County of Santa Clara* (1969) 270 Cal.App.2d 691, 699.) When a series is enumerated in a statute, commas are placed between each member of the series. In the present case, the Legislature's decision was not to separate the last two members in the sentence by commas but instead to separate them with the conjunction "or." This indicates a legislative intent that the two members should be treated together, i.e., "religious" modifies both "association" and "corporation not

organized for private profit." Had the Legislature intended non-profit corporations to be a separate class of exempt entities from religious associations, it would have placed a comma after "religious associations." It did not do so.

The DFEH correctly argues that no ambiguity exists in the statute and that the Club is clearly within the ambit of the Act as amended by AB 1047, Chapter 1019, statutes of 1977. Prior to 1978 Government Code, section 12926 (former Lab. Code, § 1413(d)) read in pertinent part:

> " 'Employer,' except as hereinafter provided, includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities.
>
> " 'Employer' does not include a social club, fraternal, charitable, educational or religious association or corporation not organized for profit."

A reading of the pertinent parts of the Legislative Counsel's Digest on AB 1047, as originally introduced and as amended, is sufficient to dispose of the question of whether ambiguity exists as to those entities subject to the Act.

In the first version of the bill, the Digest read:

> "Existing law specifically excludes as an employer, for purposes of the California Fair Employment Practice Act, a social club, fraternal, charitable, educational, religious association or corporation not organized for private profit.
>
> "This bill would repeal such exclusions, and instead only exclude a religious association or corporation when employing persons directly involved in carrying out the religious purposes of the religious association or corporation." (March 22, 1977.)

The Legislative Counsel commented on the August 17, 1977, version of the proposed amendment to the section as follows:

"...

This bill would repeal such exclusions and instead only exclude a religious corporation, association, educational institution, or society."

Finally, the Legislative Counsel's Digest accompanying the present version of the Act read:

"...

This bill would repeal such exclusions except that the exclusion of a religious association or corporation not organized for private profit would be retained."

A comparison of the Act's reference to "corporations not organized for private profit" and corollary references in the Corporations Code[2] lends additional support to our standing interpretation that religious non-profit corporations are the only non-profit corporations exempt from the Act. (Cal.Admin. Code, tit. 2, sec. 7286.5, subd. (a)(5), (6); *DFEH v. City of Napa Housing Authority* (1981) FEHC Dec. No. 81-12.)

The Corporations Code, as reorganized by the 1978 amendments, provides for three types of non-profit corporations: religious non-profit (Corp. Code, § 9110 et seq.), mutual benefit non-profit (Corp. Code, § 7110 et seq.), and public benefit non-profit (Corp. Code, § 5110 et seq.). The requirements and laws governing the religious non-profit corporation are distinctly different from those governing the other non-profit corporations. It is reasonable, therefore, that the Legislature might choose to exempt only religious non-profit corporations from the purview of the Act. Religious non-profit corporations have always been accorded separate treatment under California's non-profit laws because of their unique protected status under the First Amendment to the United States Constitution. Even prior to the reorganization of the state's non-profit law in 1978, California courts were careful to respect the special status afforded religious non-profit corporations. (See, e.g., *Maxwell v. Brougher* (1950) 99

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[2] Coincident with the amendment of the definition of "employer" in the Act, the Legislature substantially amended the body of non-profit corporation law.

Cal.App.2d 824.) The separate treatment of religious non-profit corporations, then, as the only exempt employers under the Act, continues a long and historical record of legislative deference to such activities.

Finally, our interpretation of the statutory subsection is mandated by the fact that alternative constructions of its meaning lead to preposterous results and frustrate the Act's purpose. "[I]t is the rule that where two possible interpretations of a statute are presented, the court should adopt the interpretation producing the most reasonable result." (*Paris v. County of Santa Clara, supra,* 270 Cal.App.2d at 699.)

Respondent's argument that any and all non-profit corporations in the state are exempt from the Act's coverage, while only those associations which are religious are exempt, would result in the exclusion of such non-profit corporations as, for example only, Blue Cross/Blue Shield, the American Automobile Association, and Kaiser Foundation. Educational non-profit corporations would be exempt from the Act, whereas educational associations would not. In short, an amendment that eliminated certain exempt entities (including social clubs) from the Act's coverage would be turned "on its head" and construed to increase by thousands of employees the number of unprotected individuals. Respondent's proffered construction of Government Code section 12926 is rejected.

PRIMA FACIE CASE

The opportunity to seek, obtain and hold employment without sex discrimination is a civil right. (Gov. Code, § 12921.) The Act provides that it is an unlawful employment practice for an employer to discriminate against any person by refusing to hire or employ her, or to discriminate against such person in the terms, conditions or privileges of employment, on account of her sex. (Gov. Code, § 12940, subd. (a).) The purpose of the law is "to eliminate the means by which individuals of the female sex have historically been relegated to inferior jobs and to guarantee that in the future both sexes will enjoy equal employment benefits." (Cal. Admin. Code, tit. 2, § 7290.6, subd. (b).) To effectuate its

purposes, the provisions of the Act are to be liberally construed. (Gov. Code, § 12993, subd. (a).)

Initially, the DFEH has the burden of establishing a prima facie case of employment discrimination. While there is no fixed formula for establishing a prima facie case, the DFEH has the burden of offering evidence adequate to create an inference that an employment decision was based on a criterion illegal under the Act. Once a prima facie case is established, the respondent must go forward in articulating a legitimate, non-discriminatory reason for its conduct, or, in the alternative, to establish by the preponderance of the evidence an affirmative defense excusing its otherwise unlawful discrimination. *(DFEH v. Hubacher Cadillac/Saab* (1981) FEHC Dec. No. 81-01.)

The DFEH established a prima facie case in that Respondent admits that it discriminates against women in filling those positions which allegedly require employee presence at Club associational activities. The Club offers four affirmative defenses to its otherwise unlawful employment practices.

OVERVIEW

The proposed enforcement of the Act against a strictly non-commercial, distinctly private social club is one of first impression. It is therefore appropriate that we sketch the relative postures of the parties to this litigation. In doing so, we bear in mind the proper perspective on employment discrimination as voiced by Justice Tobriner:

> "An individual's freedom of opportunity to work and earn a living has long been recognized as one of the fundamental and most cherished liberties enjoyed by members of our society [cite omitted], and, as one jurist has aptly noted, 'discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for [oneself and] one's family in a job or profession for which [s]he qualifies and chooses.' [cite omitted]." (*Gay Law Students Association v. Pacific Telephone and Telegraph Co.* (1979) 24 Cal.3d 458, 470.)

The Class Members

The class members who are precluded from employment in those positions in the Club which allegedly require servicing Club members during associational activities have been historically relegated to a subservient economic status. Despite their arduous efforts to obtain the right to vote, to force changes in the laws which prohibited them from owning property, to vitiate medieval notions and eradicate "protective laws" which serve to channel them out of the economic mainstream, these victims of so-called "benign" discrimination continue to barely survive on the market crumbs that are left by the traditional male breadwinners. It is the case that, in Justice Peters' metaphor of the female's plight in speaking on behalf of a unanimous California Supreme Court, "[t]he pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage." (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 20.)

We are confronted with a case of discrimination against the entire class of women. That fact, however, has an insidious tendency to blunt rather than sharpen one's proper focus on each individual woman, such as Ms. Esses, who is in need of work, is rejected for employment on the basis of her "very womanhood"[3], and is thus yet again reminded that she is blessed with a trait which has, by chance and design, damned her with unconscionable penalties since birth. In light of the pervasive constraints placed upon women across a myriad of endeavors, it is no wonder that the President's Task Force on Women reported the following grim statistics with respect to their attempts to obtain equal employment opportunities:

> "Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round full-time is $7,396, of Negro men $4,777, of white women $4,279, of Negro women $3,194. Women with some college education, both white and Negro, earn less than Negro men with eight years of education. [¶] Women head 1,728,000 impoverished families, Negro males head 820,000. One-

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[3] *Dothard v. Rawlinson* (1977) 433 U.S. 321, 336.

> quarter of all families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty. [¶] The unemployment rate is higher among women than men, among girls than boys." (A Matter of Simple Justice: The Report of The President's Task Force on Women's Rights and Responsibilities (1970) at 18.)

It is perhaps perversely fitting that the Bohemian Club—bastion of conservativism[4] and refuge for (among others) the political, artistic and economic elites of this country[5]—would decline to lend both hands to the 52% of our population who continue to struggle.

Even outside the present employment controversy, it cannot be said that the Club's practices do not stifle the goal of female economic parity. We are not unmindful of the "outer benefits" in the form of economic advantages attendant to Club membership; although the Club is clearly not a "businessman's club" as that term is normally used, it is beyond cavil that the fraternal relationships spawned through members' participation in Club associational activities in turn breed commercial contacts which are not as readily available to women who are precluded from membership solely on the basis of their sex. (See, *Kiwanis Club of Great Neck v. Kiwanis International* (N.Y. Sup.Ct.App.Div. 1976) 383 N.Y.S.2d 383 (dis. opn. of Shapiro, J.).) It is not difficult to perceive the vicious cycle of exclusion in which many women find themselves; certainly this injurious result "women never quite understand."[6]

We recognize that they who interpret the law so as to conform reality to their liking take a dangerous sideroad. It is imperative that all who seek the State's protection realize that the Constitu-

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[4] Exh. Q, *Bohemian Club* (1978) "Bohemia", at 3.

[5] The record is replete with evidence that the Club boasts a membership of the most powerful and influential persons in the world.

[6] "Men can decently love each other, they always have, but women never quite understand." "Bohemia", supra, at 5.

tion, and the Act, secure civil rights, not social rights.[7] As Justice Goldberg succinctly stated in his concurring opinion in *Bell v. Maryland* (1964) 382 U.S. 226, 294-295, "there are two kinds of relations of men, those that are controlled by the law and those that are controlled by personal choice. The former involves civil rights, the latter social rights." "[T]here is no 'abstract right to be admitted' to membership in a voluntary association . . ." (*Trautwein v. Harbourt* (N.J. App.Div. 1956) 40 N.J. Super.Ct. 247, 123 A.2d 30, 37.)

In any event, the more complex dynamics of social accessibility and its concomitant economic rewards are not at issue here. We are simply presented with an admittedly discriminatory employment practice by an employer subject to the Act, and we find sufficient signposts on the path of stare decisis. Although that part of the road ahead of us may as yet be untravelled, it is the same road which has been well-trod for a time longer than we would have hoped necessary.

The Bohemian Club

The Bohemian Club is a strictly non-commercial, distinctly private social club comprised of a wide variety of political figures, captains of industry, performers, writers, columnists and others who meet in an arena of the arts. They are gregarious, mutually supportive individuals who find fulfillment in celebrating the arts within the confines of the City Club and Grove enclaves. The club's position in this litigation is that it only wants to be let alone. It argues that male gender is a bona fide occupational qualification for the positions in issue; that its discriminatory employment practices are constitutionally protected under the rights of privacy and association; and that the state is powerless to enforce the Act against the Club under the Supremacy Clause of the United States Constitution.

It is mistaken.

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[7] The opportunity to seek, obtain and hold employment without sex discrimination is a civil right. (Gov. Code, § 12921.)

We observe at the outset that all persons enjoy the protections embodied in the Bill of Rights, and all enterprises are, to some degree, subject to state authority. As stated by Justice Douglas in his concurrence in *Lombard v. Louisiana* (1962) 373 U.S. 267, 280-281, "there is hardly any private enterprise that does not feel the pinch of some public regulation—from price control, to health and fire inspection, to zoning, to safety measures, to minimum wages and working conditions, to unemployment insurance." The fact that the product of one's business (or pleasure in the case of the Club) is of conspicuous constitutional import does not immunize the activity from restraints in the form of valid economic regulations exercised pursuant to the state's police power.[8] The Supreme Court affirmed this proposition almost half a century ago in a line of cases dealing with freedom of the press. In subjecting the Associated Press to the Sherman Antitrust Act, the Court noted that "[t]he fact that the publisher handles news while others handle food does not... afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." (*Associated Press v. United States* (1945) 326 U.S. 1, 7.) Particularly apposite here is the Court's earlier ruling that AP was prohibited "from discriminating against any employee in respect of hire, or tenure of employment, or any term or condition of employment" on account of such employee's unionizing activities. (*Associated Press v. Labor Board* (1937) 301 U.S. 103, 124.)

"It is to be remembered that petitioners' are not the only rights which may be involved or threatened with possible infringement. Their employees' rights and the public interest under the declared policy of Congress also would be affected if petitioners should enjoy the practically complete immunity they seek." (*Oklahoma Press Publishing Co. v. Walling* (1946) 327 U.S. 186, 218.)[9] The

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[8] The Act is "deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health, and peace of the people of the State of California." (Gov. Code, § 12920.)

[9] California's compelling interest in providing women equal employment opportunities is codified in Government Code section 12920 which provides in part:

Club, when choosing to act as an employer, when functioning as such by availing itself of the benefits of the labor market, must comply with the laws which protect the workers of the non-Bohemian society.

FIRST AFFIRMATIVE DEFENSE: The Right Of Privacy As Precluding Enforcement Of The Act Against The Club

Respondent argues that it enjoys immunity from the Act based on its perceived right of privacy as enunciated by the United States Supreme Court. It is not clear, however, in which family of cases Respondent feels most at home. The progeny of Brandeis' and Warren's seminal article, *The Right to Privacy* (1890) 4 Harv.L.Rev. 193, can be traced in four lines: 1) cases involving nudity; 2) cases involving search and seizure; 3) cases involving tortious behavior; and 4) cases involving such intimate decisions so as to be ranked " 'implicit' in the concept of ordered liberty." (*Paul v. Davis* (1976) 424 U.S. 693, 713.) As we shall see, the problem with the Club's claim is not merely that it does not fit neatly into one of the lines of privacy cases, but, rather, that it does not fit into a privacy analysis at all. We shall examine each line in turn in addition to addressing Respondent's possible refuge in California's explicit privacy clause contained in article I, section 1 of the state Constitution.

We entertain doubts as to the fundamental soundness of the "nudity" line of cases.[10] "One lesson the women's rights move-

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"It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.

"It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general."

[10] See, e.g., *Fesal v. Masonic Home of Delaware, Inc.* (D.C. Del. 1978) 447 F.Supp. 1346, aff'd. without opn. (3d Cir. 1979) 83 FRD

ment has taught us is that many long-held conceptions concerning the sexes have been found to be erroneous when exposed to the light of empirical data and objectivity." (*Mieth v. Dothard* (M.D. Ala. 1976) 418 F.Supp 1169, 1178, aff'd. in part and rev'd. in part *sub nom. Dothard v. Rawlinson,* supra.) In any event, it is sufficient to observe that the Club frankly states that this line of cases is irrelevant to its defense of this matter.[11]

161, wherein the court concluded that a nursing home which served female patients could not accommodate male nurses without increasing its total number of employees and thus had established a bona fide occupational qualification ("BFOQ") for the position. Given the fact that nurses are essentially indistinguishable from doctors with respect to the maintenance of a professional relationship with the patient, we question the continued validity of seeking accommodation in such instances, much less granting a BFOQ where accommodation is unavailable. (See, *Roe v. Wade* (1973) 410 U.S. 113 wherein the Court conditioned a woman's constitutional privacy right to decide whether or not to terminate her pregnancy on the participation and concurrence of a physician, whom the Court conceptualized as male:

> "... the attending physician, in consultation with *his* patient, is free to determine, without regulation by the State, that in *his* medical judgment the patient's pregnancy should be terminated." (*Id.,* at 163, emphasis supplied.)

The Court's view of the private abortion decision as being made by a pregnant woman and a male physician is a reminder of how commonly we accept the participation of persons of both sexes in the most intimate privacies of our lives.) As observed by the court in *Gunther v. Iowa State Men's Reformatory* (D. Iowa 1979) 462 F.Supp 952, 956, fn.4, aff'd. (8th Cir. 1979) 612 F.2d 1079, cert. den. (1980) 446 U.S. 966, "mores as to being viewed naked by members of the opposite sex under certain circumstances are bound to change as women become further integrated into the occupational and professional world. See *Dothard v. Rawlinson,* [14 EPD ¶ 7632] 433 U.S. 321, 346 n.5 (Marshall, J., dissenting). The traditional rule that only male guards may view male inmates under these conditions may derive from just the type of stereotypical value system condemned by Title VII." (Accord, *Doe v. Duter* (W.D. Wisc. 1976) 407 F.Supp 923, 925.)

[11] See, Response of Bohemian Club to Notice of Opportunity for Further Argument, at 6-13.

To our knowledge, no court has ever sanctioned a privacy defense in the context of voluntary nudity as it exists at the Grove. We and courts which have addressed this factual supposition have indicated that such a defense would be meritless. (See, e.g., *DFEP v. Merced County Sheriff's Department* (1979) FEHC Dec. No. 79-13, at 10 ("Presumably, absent unusual circumstances, inmates could act to protect their privacy during announced or regularly scheduled checks. If an inmate chose not to do so, clearly the presence of a guard of the opposite sex is not troubling."); *DFEP v. Los Angeles County Probation Department* (1978) FEHC Dec. No. 78-06, at 6 ("The large majority of wards are protective . . . and do not expose their genitalia in the dormitory area and do seek to limit their exposure by removing their undershorts only inside the toilet-shower enclosure area and only for time periods required to accomplish the showering and toilet functions. Privacy of the wards from exposure to female staff, in this connection, is easily afforded by the wards removing their soiled undershorts and putting on clean undershorts in the toilet-shower enclosure area immediately before and after showering."); *Forts v. Ward* (2d Cir. 1980) 621 F.2d 1210, 1217 ("[No] legally enforceable rights of inmates sufficient to impair employment rights can arise from an inmate's preference for sleepwear of her choice or for none at all."); *Ludtke and TIME, Inc. v. Kuhn* (S.D. N.Y. 1978) 461 F.Supp 92, 97 ("[T]here are several other less sweeping alternatives to the present policy of blanket exclusion of women reporters. Counsel for defendants admitted that those players who are desirous of undressing can retreat to their cubicles in the clubhouse. There the players can be shielded from the 'roving eyes' of any female reporters by having each cubicle furnished with a curtain or swinging door. It is also conceded that the player who is undressed and wishes to move about in that state can use a towel to shield himself from view. . . . [O]nly a backdrop behind the player standing in front of the camera is provided to shield other players from the 'roving eye' of the camera . . . This practice, coupled with defendants' practice of refusing to allow accredited women sports reporters to enter the locker room, shows that the latter is substantially related only to maintaining the locker room as an all-male preserve[,]" which,

we add, is also the primary goal of the Club and one that, obviously, was disdainfully rejected in *Ludtke*.)

The fact that members may prefer to go unclothed is not a matter of constitutional import. The right of privacy does not allow Club members to expose themselves at the expense of equal employment opportunity.

The second line of privacy cases was spawned from the prohibition against unreasonable searches and seizures embodied in the Fourth Amendment to the United States Constitution and article I, section 13 of the California Constitution. These cases focus on whether one's "reasonable expectation of privacy was violated by unreasonable governmental intrusion. [cites omitted]." (*People v. Triggs* (1973) 8 Cal.3d 884, 891 (clandestine police surveillance of doorless stalls in public restrooms violative of right of privacy); accord, *People v. Krivda* (1971) 5 Cal.3d 357, 366, vacated (1972) 409 U.S. 33, aff'd. on state grounds (1973) 8 Cal.3d 623 (police search of trash cans in front of home violative of right of privacy).)

This line of cases seems particularly inapplicable to the facts here, primarily because the central characteristic of each of these cases is the surreptitious gathering of evidence by policing authorities. (See, e.g., *People v. Triggs*, supra, 8 Cal 3d. at 891 ("Most persons using public restrooms have no reason to suspect that a hidden agent of the state will observe them.").) Although a Commission order to have the Club employ females in those positions from which they are presently excluded would constitute "state action" for purposes of the Club's invocation of its members' constitutional rights, (*Loyal Order of Moose, Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, 179), it is clear that the females subsequently employed could in no way be characterized as "agents" of the state for policing or any other purpose. Furthermore, there would be nothing "surreptitious" about their presence, and there is no issue as to "gathering evidence" because the record supports a conclusion that female employees at the Club

would exercise as much discretion in not disclosing Club activities as do their male counterparts presently.[12]

A second major distinguishing feature between the Fourth Amendment cases and the present case is that the Club has not exhibited a "reasonable expectation of privacy." (*Katz v. United States* (1967) 389 U.S. 347, 360 (conc. opn. of Harlan, J.).) "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." (Id., at 351.) Having hired employees, Respondent's members' expectation of privacy is necessarily diminished by the presence of the employees, regardless of their sex.[13]

To our knowledge, only one court has addressed a sex-specific privacy claim in the context of the Fourth Amendment. In *Doe v. Duter*, supra, 407 F.Supp. at 925, the court was called upon "to hold, as a constitutional rule of general application, that males may not participate in bodily searches of young females, absent a sufficiently compelling emergency." Although noting that it had "taken judicial notice that young females, generally, perceive and sense a significant difference [between being] forcibly restrained by a male or a female," the court was "unwilling to assume that the phenomenon is sufficiently permanent to compel that acceptance of it be cemented within the Constitution." (Id., at 924; and see, footnote 10, ante.)

We note, as did the United States Supreme Court in *Katz v. United States*, supra, 389 U.S. at 350-351, that

> "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have

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[12] "Q. Why do you think that female employees would be any more prone to divulge—

A. I don't think so. There's no reason that women would be less disposed to extend loyalty." (Buckley testimony, R.T. at 444.)

[13] Indeed, the Club bases its BFOQ defense on its factually erroneous contention that employees are intimately involved in Club associational activities. (See, post, at 42-44.)